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80-1525

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

GENERAL RAILWAY SIGNAL COMPANY,
A SUBSIDIARY OF GENERAL SIGNAL INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Page

Appendix A—Per Curiam Opinion of the Court of Appeals for the District of Columbia Circuit, No. 79-2440, dated December 10, 1980 1

Appendix B—Order of the Court of Appeals for the District of Columbia Circuit denying rehearing *en banc*, No. 79-2440, filed January 8, 1981 3

Appendix C—Order and Opinion, U.S. District Court for the District of Columbia, C.A. 77-0657, filed November 13, 1979 5

Appendix D—Memorandum Opinion and Order, U.S. District Court for the District of Columbia, C.A. No. 77-0657, filed August 5, 1977 11

Appendix E—WMATA Final Decision, Eng BCA Nos. 3560, 3592, and 3638, September 21, 1976; Corps of Engineers Board of Contract Appeals Decision, Eng BCA Nos. 3560, 3592, and 3638 15

Appendix F—WMATA Final Decision, Eng BCA Nos. 3560 and 3638, February 26, 1979; Corps of Engineers Board of Contract Appeals Decision, Eng BCA Nos. 2560 and 3638, December 18, 1978.... 32

Appendix G—Excerpt from Transcript, Hearing on Motions, C.A. 77-0657, U.S. District Court for the District of Columbia, July 13, 1977 39

Appendix H—§ 6, Disputes, Standard Form 23-A; § 1.6, "Disputes," General Provisions, WMATA Contract No. 1Z4206 41

Appendix I—§§ 4, 20, 80, 81, WMATA Compact, Act of November 6, 1966, Pub. L. 89-774, 80 Stat. 1324.... 43

Appendix J—District of Columbia Code, Title 12, § 301 45

Appendix K—District of Columbia Code, Title 15, §§ 108, 109.. 46

Page

Appendix L—The Wunderlich Act, 41 U.S.C. §§ 321-322 47

Appendix M—Notice of Appeal filed in lieu of Complaint by General Railway Signal Company, Eng BCA No. 3560, November 8, 1974 48

Appendix N—Complaint of General Railway Signal Company, Eng BCA No. 3638, dated May 30, 1975.. 51

Appendix O—Section IV, Brief for Appellant General Railway Signal Company, Eng BCA Nos. 3560, 3592, 3638, dated April 8, 1976 62

Appendix P—Section V, Respondent's Post-Hearing Brief, Eng BCA Nos. 3560, 3592, 3638, dated April 8, 1976 65

Appendix Q—Section IV, Reply Brief for Appellant, Eng BCA Nos. 3560, 3592, 3638, dated May 12, 1976.. 67

Appendix R—Section V, Respondent's Reply Brief, Eng BCA Nos. 3560, 3592, 3638, dated May 18, 1976 71

Appendix S—Complaint of General Railway Signal Company, C.A. No. 77-0657, U.S. District Court for the District of Columbia, filed April 14, 1977.... 73

Appendix T—Section VII, Memorandum of Points and Authorities in Support of Defendant's Cross Motion for Summary Judgment, C.A. No. 77-0657, U.S. District Court for the District of Columbia, dated June 14, 1979 79

Appendix U—Letter, General Railway Signal Company to WMATA, dated January 5, 1976 81

Appendix V—Memorandum Opinion, John J. Wilson, Inc. v. Granite-Groves et al., C.A. No. 78-1498, United States District Court for the District of Columbia, December 22, 1978 83

Appendix W—Sections III and IV, Plaintiff's Reply Memorandum, General Railway Signal Company v. WMATA, C.A. No. 77-0657, U.S. District Court for the District of Columbia, September 2, 1977 96

Page

Appendix X—Resolution of the Board of Directors of the Washington Metropolitan Area Transit Authority dated June 3, 1971; Resolution of the Same, dated July 7, 1967, revised March 21, 1968, and October 2, 1969; Chapter V, Contract Claims and Disputes, Sections A, B, and C, WMATA Policies and Procedures Manual.... 98

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2440

GENERAL RAILWAY SIGNAL COMPANY

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Appellant

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 77-0657)

Argued November 14, 1980

Decided December 10, 1980

Leonard Petkoff, with whom *Tod Gold*, was on the brief for appellant.

William Eggers, of the bar of the Court of Appeals, New York *Pro Hac Vice* by Special Leave of Court and *H. Tuohey* was on the brief, for appellee.

* * * * *

Before: MCGOWAN and EDWARDS, *Circuit Judges* and JOYCE HENS GREEN,* *United States District Judge* for the District of Columbia.

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

PER CURIAM: We affirm the judgment here appealed from on the basis of the opinions and orders of the District Court dated August 5, 1977 and November 13, 1977. App. 819 and 1314. In our view, the District Court opinions properly held that the law governing this case is the law of the District of Columbia, D.C. Code Ann. §§ 15-108, 15-109 (1973); that the disputed contract included an implied condition requiring WMATA to make equitable adjustments of claims under the contract within a reasonable period of time; that a failure to comply with that condition could give rise to a claim for interest under the parties' contract; that there was no substantial evidence to support WMATA's finding of no unreasonable delay; and that, therefore, interest was properly given under the contract pursuant to applicable District of Columbia law.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 77-0657

No. 72-2440

GENERAL RAILWAY SIGNAL COMPANY
Appellee

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Appellant

Argued 11-14-80

Filed Jan. 8, 1981

Before: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and Joyce Green*, Judge, United States District Court for the District of Columbia

ORDER

Appellant's petition for rehearing *en banc* has been circulated to the full Court and no member of the Court, or of the panel, has requested the taking of a vote thereon. On consideration of the foregoing, it is

---

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED by the Court, *en banc* that appellant's petition for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Defendant

Filed Nov. 13, 1979

ORDER

Upon consideration of cross-motions for summary judgment, memoranda of points and authorities filed in connection therewith, and after oral argument of counsel, it is by the Court this 9th day of November 1979

ORDERED that plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied, and it is further

ORDERED plaintiff is entitled to interest from August 20th and December 13, 1973 to January 17, 1977, plus interest in the statutory amount on the sum of the foregoing interest from January 17, 1977 until paid.

/s/ John Lewis Smith Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Defendant

Filed Nov. 13, 1979

OPINION

Plaintiff, General Railway Signal Company (GRS), brings this action to set aside the administrative determination of defendant, Washington Metropolitan Transit Authority (WMATA), that the Contracting Officer had not taken an unreasonable amount of time in processing GRS's two claims for extra work required by changes that WMATA ordered in its original contract. GRS filed its first request for payment of the double break circuitry claim on August 14, 1972, and completed the double break circuitry work in August of 1973. It filed its first request for payment of the call-on circuitry claim on July 14, 1972, and completed this work in December of 1973. The Corps of Engineers Board of Contract Appeals (Board) upheld these claims on August 30, 1976 and WMATA paid GRS on January 17, 1977. By Order of August 5, 1977, subsequently modified on March 28, 1978, this Court directed WMATA to pay plaintiff interest on the amount of the claims if upon remand to WMATA the claims processing period was found unreasonably lengthy. GRS demands interest from August 20 and December 13, 1973 to January 17, 1977,

the first dates after the completion of each project on which GRS requested payment from WMATA, in the amount of $31,888.56, plus interest on that amount from January 17, 1977, to present.

Upon remand, WMATA's General Manager forwarded this matter to the Appeals Board for hearing and advisory opinion. The Board held an adversary hearing, took evidence, and considered briefs from both parties. The unanimous view of the Board was that

> the time taken for consideration of the claim at the Resident Engineer and Contracting Officer level, while not unusual, especially in view of appellant's lack of assertive action pressing for an early decision, was much too long when all of the circumstances are considered. For that reason the question posed by the District Court must be answered in the affirmative. There was too much delay in processing the claims from which the appeals arose. *General Railway Signal Co.*, Eng BCA 3560, 3638, 79-1 BCA ¶ 13,622. (Opinion of Administrative Judge Jellico).

Although the General Manager adopted the Board's findings of fact, he nevertheless decided that the Board's conclusion was contrary to applicable law. He therefore announced that the Contracting Officer had not taken an unreasonable amount of time and denied the award of interest. The case before the Court on cross motions for summary judgment.

The Court finds as follows:

1. The defendant determined that upon remand this Court had set forth an erroneous standard when it ordered WMATA to determine whether or not the appeals process has been unreasonably lengthy. The proper standard, defendant argues, is set forth in *John J. Wilson, Inc.* v. *Granite-Grooves*, No. 78-1498 (D.D.C. December 12, 1978), in which the Court asks whether an administra-

tive remedy is inadequate or futile, not whether it is unreasonably lengthy.

Defendant rightly observes that the proper standard for this Court's review of administrative decisions depends upon whether the question presented concerns an issue of law or of fact. An administrative decision concerning a question of law does not carry the presumption of finality accorded a decision of a question of fact, and may be decided by the Court itself. 41 U.S.C. § 322. *See, e.g., Crowder* v. *U.S.*, 255 F. Supp. 873 (D.C. Cal. 1964), *affirmed* 362 F.2d 1011 (9th Cir. 1966). As a question of law, the Court today rules that its Order of August 5, 1977, established the proper standard for the remand and the appropriate question was whether or not the appeals period had been unreasonably lengthy.

In reviewing the determination of the agency that the period of review was not unreasonably lengthy, to the extent that this is a question of fact, the Court may set aside this finding if it is "capricious or arbitrary or so grossly erroneous and necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. § 321. Upon the record before it, including the transcript of the December 18, 1978, hearing of the Board, the briefs thereafter submitted by both parties, and the memoranda in support of the cross motions for summary judgment, the Court finds that WMATA's determination that the delay was not unreasonably lengthy is not supported by substantial evidence. The Court of Claims has paraphrased this standard in *Marlay* v. *U.S.*, 423 F.2d 324 (1970), saying that

> [w]here, as here, the claim is that the evidence did not support the finding, the court does not reweigh the evidence to determine whether it is in agreement with the findings of the Board [in the case at bar, WMATA]. The inquiry is directed to whether on the disputed facts the Board had sub-

> stantial evidence to support its determinations. Plaintiff has the burden of showing that no such evidence is in the record, or that the evidence contrary to the Board's findings is either overwhelming in itself or so detracts from the evidence in support of the Board's findings as to render it less than substantial on the record as a whole.

Here, the contrary evidence so detracts from the evidence given in support of WMATA's conclusion as to render it less than substantial considering the entire record. The Court, in other words, reaches the same conclusion as did the Board in its unanimous decision that the delay was unreasonably lengthy.

2. The Court must next determine the period of time for which interest should be awarded. This Court, in its Memorandum Opinion of August 5, 1977, found that this case involves an implied action for breach of contract and that the applicable statute for determining the award of interest is D.C. Code § 15-109*. Adhering to the rule of case doctrine, the Court will apply § 15-109, which permits a discretionary award of interest fully to compensate the government contractor. In the instant case, the Court finds that the plaintiff will be made whole if interest is awarded from the time, after completion of the work, when the plaintiff will be made whole if interest is awarded from the time, after completion of the work, when the plaintiff first requested payment until defendant made final payment, plus interest in the statutory amount on the sum of the foregoing interest from the time of final payment, January 17, 1977, until paid.

---

* It is proper to look to the D.C. Code, for the WMATA Compact itself provides that "[t]he Authority shall be liable for its contracts . . . in accordance with the law of the applicable signatory. . . ." 1 D.C. Code § 1431 note § 80 (1973).

3. Defendant argues that this Court has *sua sponte* characterized this action as one based on an implied breach of contract and in so doing has deprived defendant of the opportunity to put forward a defense based on the statute of limitations. This argument fails to realize, however, that the Court has characterized this action as an implied breach of contract action for purposes of fashioning appropriate relief. Moreover, in an action properly before an appeals body, "the statute of limitations for the institution of suit thereon cannot commence to run until final board action occurs." *Conn.* v. *United States*, 366 F.2d 1019, 1021 (1966). This contract dispute, concerning the right of plaintiff to full compensation for the cost of labor and materials expended to complete changes and extra work that defendant WMATA ordered, was properly before the Board. The statute was therefore tolled during the period of the Board's deliberations and this action, commenced on April 14, 1977, is accordingly timely.

/s/ John Lewis Smtih Jr.
United States District Judge

Dated: 11/9/79

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Defendant

Filed Aug. 5, 1977

MEMORANDUM OPINION AND ORDER

On February 23, 1971, defendant Washington Metropolitan Area Transit Authority (WMATA) awarded plaintiff General Railway Signal Company a contract for modification of rail facilities at Union Station. During the course of performance of the contract, WMATA issued a change order requiring General Railway to construct items not mentioned in the original contract or specifications. Employing its own financial resources, General Railway proceeded with construction of these items and, pursuant to the contractual provision for "equitable adjustment" of the contract price after issuance of change orders, submitted timely claims to the Contracting Officer. More than two years passed before the Contracting Officer denied the claims. In the interim, the extra work specified in the change order had been completed. Entitled under the contract to review of the Contracting Officer's decision by "the Board of Directors or its duly authorized representative", plaintiff appealed. In addition to the amounts claimed in the original com-

plaint, plaintiff sought interest which had accrued during the Contracting Officer's delay. The U.S. Army Corps of Engineers Board of Contract Appeals, which had been designated by WMATA's Board of Directors to submit to its General Manager recommended decisions on contract disputes, upheld the original protest but denied the claim for interest. The General Manager approved the Board's decision, and payment of $157,969 [1] was made on January 11, 1977. On April 14, 1977, General Railway brought this diversity suit to recover that interest. That claim is before the Court on Cross Motions for Summary Judgment and defendant's Motion to Dismiss.

There are two aspects to plaintiff's claim. First is the request for interest, for the use of its capital, as an element of the equitable adjustment. Federal contract law prohibits an award of interest unless it was an actual and necessary cost of the extra work. *See, e.g., Bell* v. *United States*, 404 F.2d 975, 186 Ct. Cl. 189 (1968); *Granite Construction Company*, 76-1 BCA ¶ 11,748 (1976); *Brezina Construction, Inc.*, 75-1 BCA ¶ 10,989 (1975). That doctrine, however, is based on the sovereign immunity of the United States,[2] which is not a party to this contract. Inasmuch as WMATA shares the immunity of neither the federal government nor the three signatories to the WMATA Compact,[3] the Board of Con-

---

[1] The amount owing for the two claims, exclusive of interest, had been stipulated on January 12, 1977.

[2] *See, Bell* v. *United States*, 404 F.2d 975, 186 Ct. Cl. 189 (1968); *Ramsey* v. *United States*, 101 F.Supp. 353, 121 Ct. Cl. 426 (1951), *cert. denied*, 343 U.S. 977 (1952); *Komatsu Mfg. Co., Ltd.* v. *United States*, 131 F. Supp. 949, 132 Ct. Cl. 314 (1955).

[3] Section 80 of the Washington Metropolitan Area Transit Authority Compact begins: "The Authority shall be liable for its contracts . . . in accordance with the law of the applicable signatory. . . ." 1 D.C.Code § 1431 note. *Cf. National Home for Disabled Volunteer Soldiers* v. *Parrish*, 229 U.S. 494 (1913); *North New*

tract Appeals erroneously relied on the immunity doctrine to deny plaintiff's claim. But this does not mean that plaintiff is automatically entitled to interest. Under the contract, the Board has final authority on a question of fact such as this.

The second aspect concerns the belated reimbursement for the extra construction costs. Implicit here is a charge that WMATA breached the contract by extensively delaying resolution of plaintiff's claim. In accordance with District of Columbia law,[4] the Court has concluded that plaintiff may recover interest resulting from delay in payment only upon a determination by the Board that the Contracting Officer unreasonably delayed processing plaintiff's claim. *See Flanaghan* v. *Charles H. Tompkins, Co.*, 182 F.2d 92 (D.C.Cir. 1950); RESTATEMENT OF CONTRACTS § 337.

Therefore, it is by the Court this 5th day of August, 1977

ORDERED that plaintiff's Motion for Summary Judgment be, and the same hereby is, denied; and it is further

---

York Sav. Bank v. *Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355 (D.C.Cir. 1975); *Lichtenstein* v. *Pennsylvania Turnpike Com.*, 398 Pa. 415, 158 A.2d 461 (1960); *State ex rel. Pacific Bridge Co.* v. *Washington Toll Bridge Authority*, 8 Wash.2d 337, 112 P.2d 135 (1941) (inapplicability of immunity doctrine to certain governmental organizations). *See also Spencer* v. *General Hospital of District of Columbia*, 425 F.2d 479 (D.C.Cir. 1969); *Elgin* v. *District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964).

[4] Under the terms of Section 80 of the WMATA Compact, *see* Footnote 3, *supra*, local law applies to actions for breach of WMATA contracts. District of Columbia law leaves to the discretion of the Court the decision to award interest in circumstances such as these. *See* 15 D.C.Code § 309 (1973); *Flanaghan* v. *Charles T. Tompkins Co.*, 182 F.2d 92 (D.C.Cir. 1950). *See also* RESTATEMENT OF CONTRACTS § 337.

ORDERED that defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that the above-captioned case be, and the same hereby is, remanded to the U.S. Army Corps of Engineers, Board of Contract Appeals for further proceedings consistent with this opinion.

/s/ John Lewis Smith Jr.
United States District Judge

APPENDIX E

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

Docket Nos. ENG BCA 3560, 3592, 3638

IN THE APPEAL OF
GENERAL RAILWAY SIGNAL CO.
UNDER WMATA CONTRACT NO. 1Z4206

FINAL DECISION

Pursuant to the authority vested in the undersigned by the Washington Metropolitan Area Transit Authority (WMATA) Board of Directors to render a final decision in any dispute under the disputes article of a WMATA contract, and

Upon consideration of the record of proceedings before the Corps of Engineers Board of Contract Appeals together with the advisory opinions of that Board dated August 30, 1976, IT IS THE FINAL DECISION OF THE UNDERSIGNED THAT:

1. DOCKET NO. ENG BCA 3560: CALL-ON CIRCUITRY IS ALLOWED IN THE AMOUNT OF $22,285.00 AND OTHERWISE DENIED. THE DECISION OF THE BOARD OF CONTRACT APPEALS IN THAT REGARD IS HEREIN ADOPTED.

2. DOCKET NO. BCA 3592: APPROACH TRACK CIRCUITRY IS DENIED IN ITS ENTIRETY. THE DECISION OF THE BOARD OF CONTRACT APPEALS IN THAT REGARD IS HEREIN ADOPTED.

3. DOCKET NO. ENG BCA 3638: DOUBLE BREAK CIRCUITRY IS ALLOWED IN THE AMOUNT OF $135,444.00 AND OTHERWISE DENIED. THE DECISION OF THE BOARD OF CONTRACT APPEALS IN THAT REGARD IS HEREIN ADOPTED.

/s/ Warren D. Quenstedt
Acting General Manager

Sept. 21, 1976

Date

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
Washington, D.C. 20314

BEFORE THE CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Eng. BCA Nos. 3560, 3592, and 3638

Appeals of

GENERAL RAILWAY SIGNAL COMPANY

Contract No. 1Z4206

Appearances for Appellant:

William D. Eggers, Esq.
Nixon, Hargrave, Devans & Doyle
Rochester, New York

Appearances for Respondent:

Leonard Petkoff, Esq.
Lewis J. Baker, Esq.
Washington, D. C.

OPINION BY ADMINISTRATIVE JUDGE JELLICO

These three appeals cover alleged constructive changes to appellant's contract.

The contract in question was between appellant and the Washington Metropolitan Area Transit Authority (WMATA). The contract was for modification of the rail facilities at Union Station owned by the Washington Terminal Company (WTC) so that those facilities could be used for the Metro system.

The work under the contract included modifications for WTC's facilities of K, C and Wye Bridge interlockings. The present appeal concerns the Wye Bridge interlocking. An interlocking is a railroad track configuration of signals and switches so arranged that trains can enter and leave an area safely. Under the arrangement prior to work under the present contract, the K interlocking was controlled by a mechanical interlocking control machine located at K tower, the C interlocking was controlled by a mechanical interlocking control machine at C tower, and the Wye Bridge interlocking was controlled by a mini-lever machine also located at C tower. Because C tower was being demolished to make way for Metro construction, the control of all three interlockings were to be operated from a single location at K tower. The control system was to be all-electric and designed and installed by appellant under its contract.

Prior to work under appellant's contract the signals of the Wye Bridge interlocking differed from those of the K and C interlockings in that the Wye Bridge signals were two-aspect and the K and C signals were four-aspect. A two-aspect signal has two colors, red and lunar white. A four-aspect signal has four colors, red, lunar white, yellow and green. When a signal light is green it gives authority for a train passing it to move at track speed at least two blocks, a block being the track area between two signals. A yellow signal light grants a train authority to move one block expecting that the next signal will be red. A lunar white signal light is a restricting signal and gives authority for the train operator to move into a given track, but to look for an obstruction, such as another train, occuping the track. A red signal light requires the train operator to stop the train. A best aspect of a signal is the one which gives the train operator the greatest degree of flexibility. For

a four-aspect signal the best aspect would be green. For a two-aspect signal the best aspect is lunar white and it is said of such a signal that the best aspect is restricting.

The question before us is whether or not appellant was to design and install call-on circuitry to the Wye Bridge signals and panel buttons for the call-on function on the new interlocking control panel designed and installed at K tower. The call-on function, and associated control button, permits a control machine operator, by pushing a button on the central console, to change the signal on a block occupied by a train from red to lunar white permitting another train to enter the block. Prior to the work under appellant's contract, the four-aspect signals of the K and C interlockings had the call-on function and control but the two-aspect signals of the Wye Bridge interlocking did not.

The plans for the Operating Panel and Track Indicator Plan submitted by appellant for installation under the contract did not have a call-on button or provide for the call-on function. WMATA's Resident Engineer disapproved the plans on 21 October 1971 with the notation:

> Call-on-Buttons: All signals should have a call-on-button except fixed signals and signals 517 and 519. See section 18.6.2.7 of the Contract specifications.

The cited provision of the technical portion of the specifications reads as follows:

> 18.6.1.7 *Call-On-Buttons*
>
> A single row of call-on-buttons located below the track diagram shall be used to establish a following movement to an occupied block. Each button shall be numbered to correspond to the signal it controls.

At a coordinating meeting on 15 November 1971 attended by representatives of the Resident Engineer, WTC

and appellant, a number of items, including the call-on buttons and associated track circuitry, were discussed. Included in the minutes of this meeting is the following comment:

> Call-on Buttons—The WTC has agreed that if a signal's best aspect is *Restricting* then those signals are not required to have the call-on feature. The affected signals route buttons to be designated by a yellow disk.

As we have indicated above, the two-aspect signals' best aspect is restricting and the quoted comment obviously refers to them.

Subsequently, by letter dated 23 November 1971, the Resident Engineer sought to get confirmation of the agreements (which he characterized as "Changes") reached at the coordinating meeting. By response of 30 November 1971, WTC retreated from its agreement and informed the Resident Engineer that:

> Call-on will be provided in conjunction with Signals Nos. 601, 603, 605, 611, 613 and 615 at Wye Bridge to permit movements past these signals when track circuits within the interlocking are occupied. The best aspect on each of these signals will be restricted.

Signals Nos. 601, 603, 605, 613 and 615 are the Wye Bridge interlocking two-aspect signals previously referred to in the decision and the subject matter of dispute under this appeal.

In a coordinating meeting on 13 December, appellant was directed to design and furnish the circuitry and control buttons for the call-on feature as WTC then wanted. The minutes read:

> The WTC requested that the Call-On feature will be required in conjunction with Signal Nos. 601, 603, 605, 609, 611, 613, and 615 at Wye Bridge to per-

> mit *MOVEMENTS* past these signals when track circuits within the interlocking are occuping. The best aspect on each of these signals will be restricting.

Appellant complied with the directive and installed the control buttons and circuitry for the call-on feature of the Wye Bridge signals. On 14 July 1972, appellant submitted a proposal of the amount it requested to be paid for doing the work. By letter of 13 November 1972, appellant was informed that the matter would have to be submitted as a claim. Appellant submitted a claim on 18 January 1973 and the Resident Engineer rejected it on 6 November 1973.

On 13 December 1973, appellant submitted its claim to the WMATA Contracting Officer for consideration. In its presentation appellant stated:

> The signal specification item on which the RE relies [for rejection of appellant's claim] is 18.6.2.7, which provides that:
>
> > "A single row of call-on buttons located below the track diagram shall be used to establish a following movement to an occupied block. Each button shall be numbered to correspond to the signal it controls."
>
> [Appellant] has reasonably interpreted that specification to require that call-on buttons be provided by others should it be determined subsequently that such call-on circuitry be desired. The specification however, does not expressly require that [appellant] provide such associated circuitry as part of [its contract]. Had such circuitry been required as part of that contract, the specifications could have and should have so stated in reasonably clear terms.

In its claim presentation, appellant retreats somewhat from its earlier position. It had previously denied that

either the control buttons or the circuitry was required. Its claim position was that the buttons were required but not the circuitry. Appellant's explanation at our hearing for its change of position was that it was willing to furnish the buttons, which were relatively inexpensive if installed as part of the original control console, and would be useful to the owner in the event of future expansion of the Wye Bridge signal system.

Appellant's retreat from its earlier position misled the Contracting Officer and his decision of 2 August 1974 denying appellant's claim rests largely on the proposition that appellant's obligation to furnish the call-on control buttons was clearly stated in the contract and undisputed by appellant. Starting from that premise the Contracting Officer concluded that appellant was required to provide the requisite circuitry to enable the specified call-on buttons for the Wye Bridge interlocking to function. The Contracting Officer placed primary emphasis on Article 2.4(h) of the specifications which provides:

> Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

The evidence before the Board is that the call-on feature is not mandatory for all signals and that appellant's original design omitting that feature from the Wye interlocking 2-phase signals was both sound and safe. It is also undisputed that nowhere in the contract plans and specifications is any provision made for adding call-on circuitry to the 2-phase Wye interlocking signals, unless 18.6.2.7 can be construed as doing so. In our opinion it

does not. That provision does not say that a call-on button will be provided for all signals. We read it as calling for buttons where the call-on feature was present for existing signals such as the 4-phase signals in the K and C interlockings. This reading is consistent with the basic contract purpose which called for appellant to design and build changes into the interlockings to accommodate their use in both the railroad and subway operations. In making its design, appellant took into account the existing situation at the K and C interlockings on the one hand where 4-phase signals and the call-on feature were in existence, and the situation at the Wye Bridge interlocking on the other hand where the 2-phase signals were present and the call-on feature not in existence. Taking into consideration the fact that the purpose of the K and C interlockings were primarily for passenger train movements but that the Wye Bridge area was principally for train storage and maintenance, appellant's design concept maintained the distinction between the two types of interlockings with respect to the call-on feature. WMATA does not question that decision on the basis of basic engineering considerations or safety. Rather, it elects to stand on what we find to be a strained interpretation of the specification section describing the control console, 18.6.2.7.

Although appellant, during the course of the dispute, was willing to concede as a matter of expediency that 18.6.2.7 could be read to require it to place the call-on buttons for the Wye Bridge 2-phase signals on the track diagram, we do not believe that it should be required to forfeit its otherwise valid claim because of that spirit of concession. It is unfortunate that the attention of the Contracting Officer was diverted from the true basis of the dispute because of appellant's willingness to make the limited concession to place the buttons on the control console. However, we find that appellant's original inter-

pretation of its obligation with respect to call-on circuitry and the control console was the correct one. Accordingly, Eng BCA 3560 is allowed.

Eng. BCA 3592

This appeal is from the denial of appellant's claim for installing approach circuitry at 10 signals and incorporating the approach track feature on the Track Indicator Diagram at K Tower.

Appellant's original submittals of final circuit drawings and wiring diagrams and for the Track Indicator Diagram disclosed that it did not intend to provide approach circuitry for signals 137, 301, 451, 453, 487, 489, 491, 493, 495 and 601 and did not intend for bulbs to be placed before the corresponding signals on the Track Indicator Diagram. Appellant was directed to place such circuits and bulbs. The signals involved are found on contract drawings Nos. M16-15, M16-16 and M16-17.

All of the signals involved in this dispute are new signals. Before other signals, which were existing signals, there is an L-shaped mark in those instances where there was approach tracking for the signal. Appellant contends that the placement of this L-shaped mark is customary where an approach track is intended by the designer and that it properly interpreted the absence of such marks in connection with the ten signals involved in this dispute as expressing the intent of the designer that no approach tracking be provided for these signals. Appellant also produced testimony that approach tracking would be an optional feature before these signals and absence of approach tracking would not affect safety because of the location of the signals in the overall system.

In his decision, the Contracting Officer does not mention a contract drawing upon which WMATA placed

great reliance at the hearing of the appeal and in its brief. That drawing is M16-3 and explains the symbols used on the other drawings. As pertinent here, the drawing shows:

[Drawing Omitted in Printing]

In his decision denying the claim, the Contracting Officer places primary emphasis upon the specifications. He correctly states that Article 2.5 (m) of the contract specifications requires the contractor to design the final circuit drawings for the revised signal system and that Article 18.2, *Track Circuit Equipment*, extends this requirement to include the location of the insulated joints which are to be furnished under the contract. He reasons that since it was the insulated joints which determine the various limits of the approach circuitry, it was appellant's design obligation to locate the insulated joints and thus provide approach track circuitry for the 10 signals involved. The Contracting Officer also emphasizes that Article 18.6.2.6, under the portion of the specifications describing the control and display panels to be designed and furnished by appellant, requires light units to be located on the Track Indicator Panel and to show red when a train occupies those track circuits in approach to a controlled signal. There is no question but that the 10 signals involved are controlled signals. He then argues that, even if track circuitry were omitted from the contract drawings, the specification requiring that red lights be displayed on the Track Indicator Panel would necessarily also require appellant to furnish the approach track circuitry necessary to make the red lights turn on when the signals were approached.

Appellant takes exception to the latter proposition in that it reads Article 18.6.2.6. only as a direction for the displaying of the red lights on approach track signals on the Track Indicator Panel where approach tracks for the signals are otherwise required by the contract.

We perceive no ambiguity in the contract documents in requiring approach track circuitry and corresponding indicator lights on the Track Panel for the 10 signals involved in this appeal. Such an ambiguity is only introduced when the symbols made applicable on all the contract drawings, on drawings M16-3, are ignored. The symbols on that drawing clearly indicate that a straight up-and-down line at a signal location instructs the bidders that track circuitry is to be provided on both sides of the signal location. Such a symbol appears at the location of each of the 10 signals in controversy here. By clear instruction of drawing M16-3, where track circuitry was to be provided on one side only of a signal location an L or an inverted L was to be shown. For instance, the L symbol appears on drawing M16-15 at signal 173 (not one of those in dispute) where no track circuitry was to be provided to the left of that signal. The best that can be said for appellant's argument with respect to drawings M16-15, M16-16 and M16-17 is that it would have made for better clarity if the L and inverted L symbols had been placed on those drawings for new signals, as for existing signals, indicating that there was a termination point for track circuitry at the end point of the approach to each for the 10 signals in dispute. However, the omission of such symbols is not controlling, especially in this case where appellant had a design function including that of establishing the insulated joints which would constitute the end point of the approach circuit. What we are holding is that, reading M16-3 together with M16-15, M16-16 and M16-17, it is clear that there was to be track circuitry on both sides of the 10 disputed signals.

Reading the drawings as we do, and as appellant was required to do, results in the absence of any conflict between them and the specifications. The drawings told appellant that there was track circuitry on both sides of the 10 signals in disputes and the specifications told

appellant that it was to establish the end point of the approach circuit to each of the signals and to provide for the red lamp on the Track Indicator Panel for each of the approach track circuits.

Eng BCA 3592 is denied.

Eng BCA 3638

This appeal involves the question whether the requirement that appellant substitute double break circuitry for single break circuitry in those portions of the signal system not affected by rerouting or signal changes. Double break circuitry uses a line of positive energy running in parallel to a line of negative energy, with parallel contacts, or breaks, on each line. Single break circuitry uses only a single line of positive energy and the negative energy is made common through the wayside locations and back to the relay room.

As existing prior to work under the present contract, the WTC signal system made use of a combination of single break and double break circuitry. Such a system is not uncommon and is considered acceptable from a safety standpoint, especially where buried cable rather than overhead wires are involved.

WMATA's position that the double break circuits were required rests on paragraph 18.1.2.2, *Signal Controls*, of the specifications. That paragraph reads:

> The control of relays whose function is vital to safety shall have double break contacts in any portions of the control circuits which are located outside the building or housing in which the controlled relay is located.

For its part, appellant relies primarily upon another specification provision supported by notations on two of the contract drawings. The specification, 18.1.1, Description, provides:

> The work to be performed under this section consists of furnishing the design of temporary and permanent block signalling and interlocking circuits for the modification of the Washington Terminal Company signal facilities at "K", "C", and "Wye Bridge" interlockings.....
>
> Except as shown on the contract drawings or otherwise herein specified, existing signal and communications material and equipment shall remain in place.
>
> Signal circuits shall be designed for control of existing and new interlocking with a view towards relating existing field wiring where possible. . . .

The drawings on which appellant places emphasis are Sheet Nos. M16-11 and M16-12. These drawings defined the work to be done at various identified wayside locations. At some locations which were part of the existing signal system work was tabulated a "tag changes only required" or "minor revisions". WMATA's interpretation that double break circuitry is required throughout that part of the existing system not affected by track rerouting or signal changes is clearly inconsistent with such characterizations on Sheets M16-11 and M16-12.

While on the subject of contract drawings, we should mention some which WMATA considers pertinent—Sheets M16-26, 27, and 29, which showed the existing cable layouts, and Sheets M16-29 through 36, which listed the existing cable types. The significance attached to these drawings derives from WMATA's position that there is a distinction between field wiring and field circuits and that appellant should only have anticipated retaining only field wiring, but not necessarily complete field circuits.

Bid opening date for this contract was 16 December 1970. Notice of Award was mailed to appellant on 23 February 1971 and Notice to Proceed on 16 March 1971. On 7 and 8 April 1971, meetings were held between

representatives of appellant, WMATA's Resident Engineer and the Washington Terminal Company to discuss details of the contract work. On 19 April 1971, one of appellant's representatives, a Mr. Horvath, wrote a memorandum reporting on the topics covered in the 7-8 April 1971 discussions. Of 26 topics mentioned in the report there is one pertinent to this dispute. It reads:

> 21. Circuits that are existing, existing circuits that [appellant] ties into, existing circuits that are re-tagged and re-used need not be double circuitry.

The Washington Terminal Company transmitted this memorandum to the Resident Engineer, with copy to the Contracting Officer, on 21 April 1971 with the request that "If you have any question or comment regarding this memorandum kindly so advise." Neither the Resident Engineer nor the Contracting Officer reacted to this invitation to question or comment upon Mr. Horvath's memorandum.

It would appear that in April 1971 everyone involved (appellant, the Resident Engineer, the Contracting Officer and the Washington Terminal Company) were in agreement with the position now being taken by appellant in these proceedings.

Nevertheless, when appellant submitted the circuit drawings and wiring diagrams retaining the single break circuitry they were rejected and appellant was required to submit new drawings calling for double break circuitry throughout the system except for controls located in K tower.

Appellant's interpretation of the contract requirements is the reasonable one when all provisions are read together in an attempt to harmonize them. We find no patent ambiguity here. An ambiguity arises only by attaching overriding importance to one sentence of Paragraph 18.1.2.2 in isolation and without attempting to reconcile or relate it to the other contract provisions,

as WMATA would have us to. The conclusion which we draw from the contract provisions themselves is reinforced by consideration of the basic purpose of this contract. Appellant was to design and build a system incorporating the changes made to the existing system but to retain in place the existing communications material and equipment and field wiring where possible, i.e., to the extent that retention would not result in an unsafe or unsound design. We consider, and there is no evidence in the record to contradict our conclusion, that retention of the single break circuitry where tracks or signals were not relocated or changed in [*sic*] consistent with the basic theory of the contract as stated in the previous sentence.

We are also impressed with the fact that the interpretation now advocated by appellant was acceptable to the Resident Engineer's representatives in April 1971 and that both the Resident Engineer and the Contracting Officer failed to question that interpretation at that time although in a position to do so. WMATA argues that the fact that the matter was discussed in April 1971 establishes that there was a patent ambiguity which appellant should have had clarified prior to bid. We do not agree. In the first place, we do not find the contract documents, when properly all considered together, as ambiguous. Also, there is no proof in the record how the matter came up at the April 1971 conferences. A finding upon our part that appellant had doubts during the bidding period but expressed them only after award would be purely speculative on our part.

We accept appellant's interpretation of the contract under this appeal. Eng BCA 3638 is allowed.

Interest

There leaves for disposition a final question raised by appellant. Appellant asks us to restudy our decision in *Granite Construction Co.*, Eng BCA 3561, 76-1 BCA

para. 11,748 and allow a percentage for interest where we find a constructive change has been made even though there has not been shown that any interest cost was occasioned by the change. We continue to believe *Granite* to have been correctly decided and therefore deny this aspect of the appeal.

In summary, Eng BCA 3560 and 3638 are allowed and Eng BCA 3592 and the interest claim are denied.

Date: 30 August 1976

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ John H. Ryan
JOHN H. RYAN
Administrative Judge

I concur:

/s/ Horace C. Reosti
HORACE C. REOSTI
Administrative Judge

* * * * *

I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision Nos. 3560, 3592 and 3638, appeals of GENERAL RAILWAY SIGNAL COMPANY, under Contract No. 1Z4206.

Date: 22 October 1976

/s/ Frances H. Aceto

FRANCES H. ACETO
Recorder

APPENDIX F

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Docket No. ENG BCA 3560 and 3638

IN THE APPEAL OF

GENERAL RAILWAY SIGNAL COMPANY
UNDER WMATA CONTRACT NO. 1Z4206

FINAL DECISION

Pursuant to the authority vested in the undersigned by the Washington Metropolitan Area Transit Authority (WMATA) Board of Directors to render a final decision in any dispute under the disputes article of a WMATA contract, and

Upon consideration of the record of proceedings before the Corps of Engineers Board of Contract Appeals together with the advisory opinion of that Board dated December 18, 1978, the findings set forth at pages 1-4 of the advisory opinion are hereby adopted and approved by the undersigned. The decision of the Board, except for the last paragraph thereof, which is considered inconsistent with local law, is approved.*

Feb. 26, 1979
Date

/s/ Theodore C. Lutz
THEODORE C. LUTZ
General Manager

* In arriving at this conclusion, I have considered the Memorandum Opinion of District Judge John H. Pratt filed with the Clerk, United States District Court for the District of Columbia on December 22, 1978 in the case of *John J. Wilson Inc.* v. *Granite Groves* v. *United Sheet Metal Inc.* v. *Washington Metropolitan Area Transit Authority*, Civil Action No. 78-1493 where in the absence of a refusal by the Contracting Officer to issue a final decision and other pertinent circumstances, delays of 21 months and 16 months, respectively, for issuance of Contracting Officer's final decisions did not render the administrative process so untimely as to support an action for breach of contract based solely on the Contracting Officer's delay in the issuance of these final decisions. (Copy attached as enclosure No. 1)

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
Washington, D.C. 20314

BEFORE THE CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Appeals of

GENERAL RAILWAY SIGNAL COMPANY

Contract No. 1Z4206

Appearances For Appellant:

William D. Eggers, Esq.
Nixon, Hargrave, Devans & Doyle
Rochester, New York

Appearances For Respondent:

Leonard Petkoff, Esq.
Chief Trial Attorney

Lewis J. Baker, Esq.
Trial Attorney
Washington, D.C.

OPINION BY ADMINISTRATIVE JUDGE JELLICO

The question now before the Board is whether the Contracting Officer unreasonably delayed processing the claims from which these appeals arose. We are considering that question as a result of a remand for further administrative proceedings made by the United States District Court in a Memorandum Opinion and Order made on 5 August 1977.

We found that these appeals were meritorious in a decision dated 30 August 1976, 76-2 BCA para. 12,1223. However, we made no allowance of interest, as part of the equitable adjustment, for the time that the claim was

pending because there was no showing that interest costs had actually been incurred. In subsequent proceedings before the District Court, that court concluded that appellant may recover interest resulting in delay of payment as a breach of contract if this Board determined that the Contracting Officer unreasonably delayed processing plaintiff's claim.

There are two appeals involved in the present proceedings—Eng BCA 3638 (double break circuitry) and Eng BCA 3560 (call-on circuitry). We shall recite the history of these claims before the Contracting Officer and his subordinates.

First with respect to Eng BCA 3638. On 2 November 1971, WMATA's Resident Engineer issued a directive requiring appellant to provide double break circuitry in areas other than those appellant had proposed. After coordination meetings on 12 November 1971 and 9 December 1971, the Resident Engineer directed appellant to provide double break circuits on all control circuits, on existing circuitry as well as new circuitry. Appellant did so. On 14 August 1972, appellant submitted its cost proposal for the work. On 13 October 1972, the Resident Engineer denied the claim. On 17 January 1973, appellant resubmitted its claim as a package with 2 other claims. The Resident Engineer again denied the claim on 28 June 1973. On 20 August 1973, appellant wrote to the Contracting Officer asking for "an early determination or negotiation in order to provide payment for the required extra work, which has been duly performed".

The Resident Engineer prepared documentation relating to the claim and forwarded it to WMATA's Supervisory Construction Engineer on 14 December 1973. The Construction Engineer concurred with the Resident Engineer's finding denying the claim and transmitted the claims package to WMATA's Office of Contract Administration on 3 January 1974.

Meanwhile, appellant had written to the Contracting Officer on 12 December 1973 as follows:

> General Railway Signal Company ("GRS") submitted to the Authority two (2) claims, both dated August 20, 1973, regarding work and services then complete and performed concurrently with GRS' performance of the referenced contract.
>
> PCO 19 to that contract regards the provision of Double Break Circuitry and GRS' claim for this work completed by January, 1974 is in the amount of $148,719.00.
>
> The significant nature of these claims indicates the cost to GRS and its subcontractor of carrying these monies for work long since completed. Accordingly, we would appreciate an indication of the status of these matters and their resolution. Anything that GRS can do to aid in this process, or to meet to discuss these claims, we will, of course, be most happy to do at the earliest possible date.

The Contracting Officer responded to this letter on 9 January 1974 to the effect the claim was being evaluated by his staff. On 5 April 1974, appellant was informed that WMATA claims procedure entitled it to discuss the claim with the Contracting Officer's staff prior to issuance of a final decision. At appellant's request such a discussion was held on 26 April 1974. Proposed findings of fact were drafted in June 1974, circulated among various WMATA staff members, and sent to appellant for comment on 16 September 1974. Appellant responded on 10 October 1974. A final findings of fact was drafted on 4 December 1974, again circulated among WMATA staff members issued to appellant on 24 March 1975.

Now with respect to Eng BCA 3560—the call on circuitry claim. On 9 December 1971, appellant was directed to provide call-on buttons and associated circuitry for all signals including those in dispute. On 14 July

1972 appellant supplied a cost proposal for performing the extra work. However, the proposal was on the wrong form and was resubmitted on 18 January 1973. On 6 November 1973, the Resident Engineer denied the claim. On 13 December 1973, appellant requested a Contracting Officer decision. By letter dated 5 April 1974, appellant was offered the opportunity to discuss the claim and did so at a meeting on 26 April 1974. At the meeting appellant was promised action in two weeks or so. A final decision was drafted on 11 June 1974 but not released until 2 August 1974.

Decision

This is a case of first impression because interest has not been payable under administrative claim situations except as specifically provided for in the contract. Therefore there has been no occasion, for assessment of interest purposes, to determine whether consideration of claims was unreasonably delayed by the Contracting Officer. A somewhat, but not entirely, analogous situation has occurred where a contractor has asked a Board or court to take jurisdiction because of failure of a Contracting Officer to render a decision on a claim. The situation is not completely analogous because jurisdiction is predicated only on a complete break-down of the administrative remedy. However, the Court of Claims had used language which may serve as a general guide as to what is expected in the administrative procedure. In *Universal Essco Corp.* v. *U.S.*, 181 Ct.Cl. 10, 385 F.2d 421, the Court said:

> There is, of course, no rule of thumb for appraising delays in the contractual-administrative process. Like all tribunals, the procuring agency has considerable discretion and leeway in controlling its procedure, and must have due time to decide fairly. On the other hand, it cannot abuse its discretion by dragging its feet so leadenly that the delay becomes intolerable. The overall standard for evaluating the

> propriety of a delay looks to the particular case and the particular situation: the agency cannot wait indefinitely before making a decision, but must act within a reasonable time under the existing facts and circumstances.

In determining the reasonable length of time which may be required for the administrative process, a number of factors must be taken into consideration. Probably the most important factor is the relative difficulty of the factual and technical issues inhering in the claim. In judging reasonableness, a reviewer must not overlook the fact that the decision must normally be made by busy individuals having other pressing responsibilities. Also too much emphasis on a speedy decision may precipitate an adverse decision which might be favorably decided if more time were taken.

However, it is quite clear in the present case, that the time taken for consideration of the claim at the Resident Engineer and the Contracting Officer level, while not unusual, especially in view of appellant's lack of assertive action pressing for an early decision, was much too long when all of the circumstances are considered. For that reason the question posed by the District Court must be answered in the affirmative. There was too much delay in processing the claims from which the appeals arose.

Date: 18 December 1978

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ E. K. McFadden
E. K. MCFADDEN
Administrative Judge

I concur:

/s/ Charles J. Sheridan
CHARLES J. SHERIDAN
Administrative Judge

* * * *

I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision Nos. 3560 and 3638, appeals of GENERAL RAILWAY SIGNAL COMPANY, under Contract No. 1Z4206.

Date: 18 December 1978

/s/ Frances H. Aceto
FRANCES H. ACETO
Recorder

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Defendant,

Washington, D.C.

July 13, 1977

The above-entitled matter came on for hearing on motions before the HONORABLE JOHN LEWIS SMITH, JR., United States District Court, beginning at 11:30 a.m.

APPEARANCES:

On behalf of the Plaintiff:

WILLIAM EGGERS, ESQUIRE
PAULA M. CONNELLY, Attorney-at-Law

On behalf of the Defendant:

LEONARD PETKOFF, ESQUIRE
LEWIS J. BAKER, ESQUIRE
MORRIS PULLARA, JR.

Dawn T. Copeland
Official Court Reporter

* * * *

[19] There is—although Mr. Petkoff appeared to take a different position this morning, but in his pleadings he has contended that we have in some way reversed our ground before this Court in our position with respect to interest, and that, Your Honor, is simply not so.

Our briefs before the Board have been put into the certified record and that is before the Court, and those briefs with respect to the intrest claim, presented argument that is substantially the same as the argument that we are making today.

THE COURT: What is the extent of the review before this Court?

MR. EGGERS: We agree, Your Honor, that under the Disputes clauses that the standard of review is in essence the Wunderlich standard and that is that factual issues as determined by the Board are binding in the absence of the standard that the contract states which is in essence that the findings were contrary to the record, fraudulent, capricious and arbitrary.

The issues of law, Your Honor, are in no way binding and we believe that the issue that is before the Court is whether the Board has applied fundamentally the correct law as to the interest.

APPENDIX H

* * * * *

Standard Form 23-A

6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

EXCERPT FROM GENERAL PROVISIONS OF WMATA CONTRACT NO. 1Z4206

1.6 *Disputes*

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors. The decision of the Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this Article, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes article does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decisions of the Board of Directors or its representative on a question of law.

* * * *

APPENDIX I

ARTICLE III

ORGANIZATION AND AREA

* * * *

Washington Metropolitan Area Transit Authority

4. There is hereby created, as an instrumentality and agency of each of the signatory parties hereto, the Washington Metropolitan Area Transit Authority which shall be a body corporate and politic, and which shall have the powers and duties granted herein and such additional powers as may hereafter be conferred upon it pursuant to law.

ARTICLE VII

FINANCING

* * * *

Acquisition of Facilities From Federal or Other Agencies

20. (a) The Authority is authorized to acquire by purchase, lease or grant or in any manner other than condemnation, from the federal government, or any agency thereof, from the District of Columbia, Maryland or Virginia, or any political subdivision or agency thereof, any transit and related facilities, including real and personal property and all other assets, located within the Zone, whether in operation or under construction. Such acquisition shall be made upon such terms and conditions as may be agreed upon and subject to such authorization or approval by the Congress and the governing body of the District of Columbia, as may be required; provided, however, that if such acquisition imposes or may impose any further or additional obligation or liability upon the Washington Suburban Transit District, the Northern Virginia Transportation District, or any component government thereof, under any contract with the Authority, the Authority shall not make such acquisition until any such affected contract has been appropriately amended.

(b) For such purposes, the Authority is authorized to assume all liabilities and contracts relating thereto, to

assume responsibility as primary obligor, endorser or guarantor on any outstanding revenue bonds, equipment trust certificates or other form of indebtedness authorized in this Act issued by such predecessor agency or agencies and, in connection therewith, to become a party to, and assume the obligations of, any indenture or loan agreement underlying or issued in connection with any outsanding securities or debts:

* * * *

ARTICLE XVI

GENERAL PROVISIONS

Liability for Contracts and Torts

80. The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Jurisdiction of Courts

81. The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

* * * *

APPENDIX J

Title 12 § 301 of the District of Columbia Code As Amended

§ 12-301. Limitation of time for bringing actions

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments—15 years;

(2) for the recovery of personal property or damages for its unlawful detention—3 years;

(3) for the recovery of damages for an injury to real or personal property—3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;

(5) for a statutory penalty or forfeiture—1 year;

(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;

(7) on a simple contract, express or implied—3 years;

(8) for which a limitation is not otherwise specially prescribed—3 years.

This section does not apply to actions for breach or[1] contracts for sale governed by § 28:2-725. Dec. 23, 1963, Pub.L. 88-241, § 1, 77 Stat. 510; Aug. 30, 1964 Pub.L. 88-509, § 2, 78 Stat. 677.

* * * *

---

[1] So in original. Probably should read "of".

APPENDIX K

Title 15 § 108 of the District of Columbia Code As Amended

§ 15-108. Interest on judgment for liquidated debt

In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid. Added Aug. 30, 1964, Pub.L. 88-509, § 3(b)(1), 78 Stat. 677.

Title 15 § 109 of the District of Columbia Code As Amended

§ 15-109. Interest on judgment for damages in contract or tort

In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest. Added Aug. 30, 1964, Pub.L. 88-509, § 3(b)(1), 78 Stat. 677.

APPENDIX L

The Wunderlich Act of 1954, 68 Stat. 81, 41 U.S.C. §§ 321-322.

§ 321. No provision of any contract entered in by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such a contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged:

Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

APPENDIX M

NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys and Counselors at Law
Lincoln First Tower
Rochester, N.Y. 14603
(718) 546-8000

August 26, 1974

Washington Metropolitan Area Transit Authority
600 Fifth Street, N.W.
Washington, D.C. 20001

Attention: Mr. Roy T. Dodge
Contracting Officer

RE: *Contract No. 1Z4206: PCO-21*

Claim for call-on Circuitry for Wye Interlocking

Gentlemen:

General Railway Signal Company ("Contractor") hereby appeals from the decision of the Contracting Officer, dated August 2, 1974, which denied the claim of the Contractor for extra work and materials furnished as a change in the contract requirements. The Contractor designates this letter as its Notice of Appeal and its Complaint and requests that the Appeal be forwarded to the Corps of Engineers Board of Contract Appeals. Please acknowledge receipt of this letter by signing and returning one copy.

For its Complaint, the Contractor states as follows:

1. The Contractor was awarded Contract No. 1Z4206 for work described in Invitation No. IFB-C-14 pertaining to Section B-5c3, WTC Alterations, Step III, B&O Route, Washington, D.C.

2. The work under the contract included the modification of certain signal bridges and the designing and furnishing of certain interlocking, signal and communications functions, with control panels, in accordance with extensive and detailed Specifications incorporated into the contract documents.

3. On December 9, 1971, the Contractor was directed to furnish call-on circuits (a feature permitting a control panel operator to move on-coming train into an already occupied block) for signals nos. 601, 603, 605, 609, 611, 613 and 615 at the Wye Bridge Interlocking.

4. The Contractor has duly performed the extra work required by that direction, including additional design engineering, field labor and material required to modify existing Wye Interlocking circuits and design wiring, labor and materials in providing safety type relays at Wye Interlocking, non-vital control relays at K Interlocking, Interface with C Interlocking, control and indication wires between K, C and Wye Interlocking.

5. The Contractor and its Subcontractor have incurred extra costs of $24,629.00 in providing the extra work as directed.

6. Pursuant to contractual clauses relating to changes and disputes, the Contractor has submitted its claim for equitable adjustments in the amount of $24,629.00 to cover the foregoing extra work.

7. The foregoing claim was denied by the Contracting Officer in a decision dated August 2, 1974.

8. The decision of the Contracting Officer is erroneous in its interpretation of the contract specifications.

9. The Contractor requests full recovery for the costs incurred in providing extra work in the amount of $24,629.00.

Very truly yours,

GENERAL RAILWAY SIGNAL COMPANY

By /s/ Nixon, Hargrave, Devans & Doyle
NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for General Railway Signal Company

The Undersigned Contracting Officer acknowledges that he received the original and two copies of the above Notice of Appeal and Complaint on August 28, 1974.

/s/ Roy T. Dodge
Contracting Officer

APPENDIX N

CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

In the Matter of the Appeal of
GENERAL RAILWAY SIGNAL COMPANY, CONTRACTOR,
Under Contract No. 1Z4206 with the
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Eng BCA 3638

COMPLAINT

Appellant *GENERAL RAILWAY SIGNAL COMPANY* states as follows:

1. On February 23, 1971 Respondent Washington Metropolitan Area Transit Authority ("WMATA") awarded appellant General Railway Signal Company ("Appellant") Contract No. 1Z4206 for work described in WMATA's Invitation for Bid No. 1FB-C-14 pertaining to Section B-5c3, WTC Alterations, Step III, B & O Route, Washington, D.C.

2. DeLeuw, Cather & Company, engineers, were appointed by WMATA to act as its authorized representative, denominated "Resident Engineer." Such authorization was in effect at all material times hereafter mentioned.

3. The work under the Contract included the modification of certain signal bridges and the designing and furnishing of certain interlockings, signals and communications, with related control panels, for the partial modification of existing facilities owned by the Washington Terminal Company ("WTC") and identified as the "K", "C" and "Wye Bridge" interlockings.

4. The work is described in Section 18 of the Contract Specifications, Article 2.4 of the Specifications, and in Contract drawings referenced therein.

5. Article 2.4 of the Specifications states in pertinent part as follows:

> . . . The work shall conform to the contract drawings and Maps, enumerated in the list of contract drawings below, all of which form a part of the Contract Documents and are available in the office of the Contracting Officer.
>
> * * *
>
> (b) The general character and scope of the work are shown by the drawings as listed in the specifications.
>
> (c) In case of differences between small and large scale drawings, the large-scale drawings shall govern. Schedules on any contract drawings shall take precedence over conflicting information on that or any other contract drawing. On any of the drawings where a portion of the work is drawn out and the remainder is shown in outline, the parts drawn out shall apply also to all other like portions of the work.
>
> (d) Standard Details are included in the contract drawings. Their application is made specific by notation on the drawings or by references elsewhere in the specifications. Where the notes on the drawings indicate modifications of the details listed, such modifications shall govern.
>
> (e) In case of difference between the Standard Details and the specifications, the specifications will govern. In case of difference between the Standard Details and the contract drawings, the contract drawings will govern.

(f) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

6. Contract drawings M16-11 and M16-12 set forth a tabulation of the signal work to be performed during Step III of the signal and communications alterations under the Contract. The tabulation calls for "tag changes only" in certain designated locations, including the location of signal circuits involved in this appeal.

7. With respect to location 16, Contract drawing M16-12 states that:

> This housing will remain with minor revisions to circuits as necessary to rearrange track circuits due to track changes in these modifications and also to track changes which were made previously.

8. Section 18.1.1 describes the signal circuit work required under the Contract. That description is as follows:

> The work to be performed under this section consists of furnishing the design of temporary and permanent block signalling and interlocking circuits for the modification of the Washington Terminal Company signal facilities at "K", "C" and "Wye Bridge" interlockings.
>
> The signal circuits required to be furnished shall be designed in such a manner that any malfunction affecting safety will cause the system to revert to a state that is known to be safe.

If any function, purpose, piece or pieces of equipment are mentioned herein and not mentioned in the description of the equipment, or elsewhere in the specifications, it shall be understood to be a requirement and the Contractor shall supply the means and/or furnish the piece or pieces of equipment necessary.

Except as shown on the contract drawings or otherwise herein specified, existing signal and communications material and equipment shall remain in place. Signal circuits shall be designed for control of existing and new interlocking with a view towards retaining existing field wiring where possible. Existing trace circuits in Washington Terminal are A.C. type with common rail returns and employ both vane and centrifugal type relays. Typical track circuits are shown on the contract drawings.

9. Section 18.1.2 described the "Operation and Functions" of the work to be performed. Subsection 18.1.2.2 states as follows:

Signal Controls

The control of relays whose function is vital to safety shall have double break contacts in any portions of the control circuits which are located outside the building or housing in which the controlled relay is located. These control circuits shall include but are not necessarily limited to the following:

(1) The controls of track relay repeaters which are used in switch locking or in the control of signal indications which reflect the state of occupancy of the first block in advance of signals.

(2) The controls of relays which effect the display of signal indications and which re-

flect the state of occupancy of the first block in advance of a signal.

(3) The controls of relays used in switch locking circuits which initiate the locking of switches in a route when interlocking home signal displays a proceed indication and check that the signal displays a "stop" indication as a prerequisite to the release of locking.

(4) The controls of relays which are employed in the control of interlocking home signals which check the state of correspondence between each position of interlocking switches and the levers which control such switches.

10. In the preparation of its bid, and in its performance under the Contract, Appellant interpreted these provisions to mean that existing field wiring would remain intact, while new work encompassed within the designated modifications would have such features as were described in Article 18.1.2.

11. On March 17, 1971 WMATA issued its Notice to Proceed under the subject Contract.

12. On April 7, and April 8, 1971 meetings were held in Washington, D.C. attended by authorized representatives of Appellant, the Resident Engineer, and the Washington Terminal Company.

13. At those meetings, Appellant stated its understanding that existing circuits that were to be re-tagged and re-used by tying into other portions of the work, which were not to be otherwise modified, were to retain their existing single-break circuitry and were not to be upgraded to double-break circuitry.

14. At the above meetings, the authorized representatives of Respondent expressed agreement with Appellant's

statement regarding the retention of existing single-break circuitry for existing circuits where the Contract drawings called for "tape changes only."

15. The April 7 and April 8, 1971 meetings were summarized in a written minutes dated April 19, 1971 prepared by Appellant. Those written minutes included the following statement:

> Paragraph 21—Circuits that are existing, existing circuits that GRS ties into, existing circuits that are re-tagged and re-used need not be double-break circuitry.

16. Neither Respondent nor its authorized representatives took exception to the minutes as prepared by Appellant.

17. In June, 1971, Appellant submitted typical circuit wiring diagrams to the Resident Engineer. These typical circuits illustrated the design concepts of the signal circuitry to be provided under the Contract. In portions material to this appeal, the typical circuit wiring diagrams prepared by Appellant showed that the existing circuitry was to retain single-break contacts while new circuitry to be supplied or modified by Appellant was to have double-break contacts.

18. On November 2, 1971 the Resident Engineer forwarded to Appellant its review comments "as information only." Comment one stated that

> All "RC", "RGP", "TP" and "H" circuits shall have double-break contacts in any portion of the control circuits which are located outside the housing where the controlled relay is located. See Section 18.1.2.2 of the specifications.

19. Following a coordination meeting held on November 12, 1971, the written minutes contained the following comment:

The WTC has agreed that the "RC" circuits as designed are acceptable. The "RGP" and "TP" circuits are required by the WTC to be double-break. The "H" circuits as designed in the "typicals" are acceptable by the WTC.

This agreement by the WTC is only tentative until formal approval is forthcoming from the signal departments of the PCTC and the C&O-B&O.

20. At a coordination meeting held on December 9, 1971 the Resident Engineers directed Appellant to provide double-break contacts for all "H's", "D's", and "TP's" in any portion of the control circuits located outside the building or housing in which the control relay is located. That direction expressly included existing circuitry as well as new circuitry.

21. The direction given in the December 9, 1971 coordination meeting was confirmed in the written memorandum of the coordination meeting, dated December 13, 1971.

22. By letter dated February 16, 1971, the Resident Engineer repeated the direction that existing circuitry as well as new circuitry have double-break contacts in the "H's", "D's", "TP's" and "RC's" circuits.

23. Appellant thereafter duly performed the work required by that direction, which included design engineering, field labor, and material, as itemized in attachment A.

24. The total costs incurred by Appellant in complying with that direction was $148,719.

25. The direction to provide double-break contacts for existing circuitry where "tag changes only" were specified in Contract drawings is a change in the Contract, entitling Appellant to an equitable adjustment.

26. Pursuant to contractual clauses relating to changes and disputes, Appellant has duly submitted its claim for equitable adjustment to the Resident Engineer and subsequently to the Contracting Officer.

27. The claim was denied by the Contracting Officer in a written Final Decision dated March 24, 1975, from which a timely appeal has been filed by Appellant pursuant to the Disputes clause of the subject Contract.

28. The decision of the Contracting Officer is erroneous in its interpretation of the Contract Specifications, Contract drawings, and application of law.

WHEREFORE, Appellant requests full recovery for the cost incurred in providing extra work in the amount of $148,719.00.

Dated: May 30, 1975

GENERAL RAILWAY SIGNAL COMPANY

By /s/ Nixon, Hargrave, Devans & Doyle
NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for General Railway Signal Company
2200 Lincoln First Tower
Rochester, New York 14603
(716) 546-8000

To: Leonard Petkoff, Esq.
Chief Trial Attorney
Washington Metropolitan Area Transit Authority
600 Fifth Street, N.W.
Washington, D.C. 20001

Recorder
Corps of Engineers Board of Contract Appeals
Room 4A, 147-Forrestal Building, S.W.
Washington, D.C. 20314

December 6, 1972

Washington Terminal Co.
Estimate 10140-15
(Revised)

Double Break Circuits

Sub-contractor's Material and Labor
(See Detailed Sheets Attached)

Material		$ 4,107.00
Labor		27,410.00
Construction Equipment		357.00
Benefits and Assessments (11.18% of Labor)		3,064.00
Insurances (6.43% of Labor)		1,762.00
Total Material, Labor and Construction Equipment		$ 36,700.00
Overhead 10%	3,670.	40,370.00
Profit 10%	4,037.	44,407.00
F.I.C.A. and Unemployment Insurance (5.8% of Labor)	1,590.	45,997.00
Escalation (Labor)	6,901.	52,898.00
Escalation (Material)	91.	52,989.00
GRS Administration 10%	5,140.	58,129.00
GRS Material and Engineering		90,590.00
	TOTAL	$148.719.00

December 6, 1972

Washington Terminal Co.
Estimate 10140-15
(Revised)

Double Break Circuits

GRS Material and Engineering

3—B Relay Rack including Mounting Bars and Fittings (@185.54)	557.00
1—Adder to increase size of 'C' Bungalow (Includes additional B Rack Frame)	511.00
208—B1 Neutral Stud Relay @ 141.11	29,351.00
2592—Man Hours Application Engineering including Field Testing @ 13.50	34,992.00
1—Lot Case Wiring Labor and Accessories (Plugboards, wire, couplers, etc.)	10,112.00
1—Lot Travel and Living Expenses for Field Testing	5,920.00
1—Lot Final Plans and Tracings (326 Hours)	4,401.00
Total GRS Material and Engineering	$85,844.00
Escalation	4,746.00
TOTAL	$90,590.00

December 6, 1972

Washington Terminal Co.
Estimate 10140-15

Double Break Circuits

Sub-contractor's Material and Labor Breakdown

	Material	Labor
Work in Field Cases for 'H' Circuits	$1,248.00	$17,368.00
3—Rack Frames	240.00	2,079.00
208—Plug-in Relays		522.00
30—Plug Ended Cables	30.00	501.00
208—Circuits—Additional work in Relay Rooms for 'H' circuits	270.00	1,914.00
208—Circuits—Testing 'H' circuits		1,389.00
	$1,788.00	$23,773.00
14% of Additional Comm. Cables	2,319.00	3,637.00
	$4,107.00	$27,410.00

APPENDIX O

CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Eng BCA 3560, 3592, 3638

Appeal of
GENERAL RAILWAY SIGNAL COMPANY
under contract number 1Z4206
with the
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

BRIEF FOR APPELLANT GENERAL
RAILWAY SIGNAL COMPANY

* * * *

IV

Appellant is entitled to interest at the legal rate recognized in the District of Columbia

Appellant requests the Board to reexamine its decision in *Granite Construction Company*, Eng. BCA No. 3561 (1-19-76), where a claim for interest on an equitable adjustment was disallowed in a contract involving WMATA. With respect, we submit that the reasoning in the *Granite Construction* case is demonstrably unsound.

In *Granite Construction* the Board began with the premise that interest has been disallowed on contract claims against the United States prosecuted through the several Boards of Contract Appeals (E.g., *Brezina Construction, Inc.*, Eng. BCA No. 3215, 75-1 BCA ¶ 10,989; *LTV Electro-systems Inc.*, ASBCA No. 14832, 75-1 BCA ¶ 11,310) and reasoned that the same rule should apply when claims against WMATA are resolved under similar contract provisions and procedures. That reasoning, however, overlooks the fact that the decisions denying inter-

est follow not from the nature of the remedy provided by the Boards of Contract Appeals but from the substantive rule of law, grounded in principles of sovereign immunity, that interest is not recoverable against the United States except where it has expressly consented. *Hind* v. *United States*, 70 Ct. Cl. 288, 41 F.2d 892 (1930); *Tillson* v. *United States*, 100 U.S. 43, 47 (1879). *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Bell* v. *United States*, 186 Ct. Cl. 189, 404 F.2d 975 (1968). There is obviously nothing about the procedures adopted by the Boards of Contract Appeals that mandates the application of that substantive rule where the party against whom the claim is made is not the United States, is not entitled to sovereign immunity, and is not the beneficiary of express statutory protection from payment of interest. See, e.g., 28 U.S.C. § 2516(a).

Where the question in *Brezina Construction* and similar cases against the United States was whether the term "equitable adjustment" constituted an *express waiver* by the United States of its sovereign immunity, the question here is whether a reasonable contractor, dealing with a party to whom no sovereign immunity attaches, was fairly and certainly apprised that the use of that term unequivocally excluded the recovery of interest otherwise allowed by substantive contract law. 22 Am Jur 2d 262-263, Damages § 184. We submit that such an interpretation is doubtful and at best ambiguous; under such circumstances the interpretation advanced by the draftsman may not prevail. Restatement of Contracts § 236(d); Nash *Government Contract Changes* pp. 231-233 (1975).

The interpretation advanced by WMATA is doubtful and ambiguous precisely because the law denying interest where the contract is with the sovereign United States can be understood only in the context of sovereign immunity not present here. WMATA does not stand in the sovereign shoes of the United States; it has no more im-

munity, statutory or otherwise, from claims for interest than does any other litigant. Nothing inherent in the term "equitable adjustment" or in the procedures of the Boards of Contract Appeals [7] or in the concept of a constructive change constitutes fair reason for GRS to conclude that the contract provisions were an express waiver of interest in the event of a breach by WMATA. The cases on which the Board relied in *Brezina Construction* hold only that the term "equitable adjustment" was not an express waiver by the United States. Certainly, the term otherwise connotes a full recovery as otherwise permitted by law. Thus, a reasonable contractor should have concluded, as did GRS, that it was agreeing to a disputes procedure in return for the obligation to proceed with directed work, not that it was being asked to confer sovereign immunity from interest claims where none otherwise existed.

Accordingly, we suggest that the Board should examine the decision in *Granite Construction* in light of arguments not there advanced and forthrightly declare that the decision is wrong in principle. Appellant GRS is lawfully entitled to interest on its contract claims at the legal rate applied under the substantive contract law. 22 Am Jur 2d 262-267, Damages §§ 184, 188; D.C. Code § 15-109 (1973).

* * * *

April 6, 1976

---

[7] The contract provides that the WMATA Board of Directors would entertain appeals from decisions of the Contracting Officer. GRS had no reason to look to the decisions of any established Board of Contract Appeals. It is highly doubtful that any reasonable contractor should be held to anticipate that the WMATA Board of Directors would apply a strained argument to bootstrap themselves into an otherwise unauthorized position of sovereign immunity. More likely, the reasonable contractor would look to the substantive contract law applied in the District of Columbia to claims against public authorities.

APPENDIX P

BEFORE THE CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Eng BCA 3560, 3592, 3638

IN THE APPEALS OF:

GENERAL RAILWAY SIGNAL COMPANY UNDER
WMATA CONTRACT NO. 1Z4206

RESPONDENT'S POST-HEARING BRIEF

* * * *

The law is well settled that when a contractor is presented with "an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representative if he intends to bridge the crevasse in his own favor." *Mountain Home Contractors, et al.* v. *The United States*, 192 Ct. Cl. 16, 21 (1970); *Beacon Construction Co.* v. *United States*, 161 Ct. Cl. 1 (1963); *WPC Enterprises, Inc.* v. *United States*, 163 Ct. Cl. 1 (1963). The inconsistency created by Appellant's position goes to the very heart of its contract performance. The value of the cable installation is approximately 5% of the total contract amount (Tr. 47/24). If the Appellant required verification of its contract performance position prior to expending funds for the procurement of materials, it certainly needed such verification while computing and evaluating its bid price. Appellant unilaterally resolved any possible conflict in its own favor when it had a clear legal duty to inquire. It cannot now transfer the burden of the risk it assumed to the Respondent. See *Blackhawk Heating & Plumbing Co., Inc.*, supra, p. 9.

V. *Interest Costs*

Appellant seeks interest costs of 1% per month for a period of 24 months. No evidence has been presented to

define the 24 month period nor to establish a general course of borrowings made necessary as a result of the alleged changed work. Appellant's claim is similar to the situation presented in *Brezina Construction, Inc.*, Eng BCA No. 3215, 75-1 BCA 10,989 where this Board held as follows:

> "However, as presented by Appellant, the interest charge is nothing more than accrued interest on a sum which would have been owing if the claim had been earlier validated. There is no provision in this contract for recognition of this type of interest charge. The record made before us will not support a finding that the interest claimed was necessary for and allocable to the effort necessary for the performance of the more difficult grading work."

This finding is consistent with the body of law developed in Federal agency contract proceedings which has been frequently cited as precedent by this Board. Neither the "changes" clause, Article 1.3 herein, nor any other contract Article makes provision for interest costs as part of an equitable adjustment. *Granite Construction Company*, Eng BCA 3561 (1976). Consequently, there being no provision in the contract under which Appellant would be entitled to interest, its claim must be denied.

* * * *

April 8, 1976

APPENDIX Q

CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Eng BCA 3560, 3592, 3638

Appeal of
GENERAL RAILWAY SIGNAL COMPANY
under contract number 1Z4206
with the
WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

REPLY BRIEF FOR APPELLANT GENERAL RAILWAY SIGNAL COMPANY

* * * *

IV

Interest

Although WMATA contends that the date from which interest is demanded is not fixed (WMATA Brief, p. 24), the record shows that the work was completed and payment demanded in December 1973 for the call-on Claim (Rule 4, tab 4h) and by August 20, 1973 for both the approach track claim (Rule 4, tab 4k) and the double break claim (Rule 4, tab 4n). By the application of D.C. Code § 15-109 and substantive rules of contract law (e.g., Restatement of Contracts, § 377), GRS seeks recovery of interest on the stipulated sums from these dates for exactly those reasons of substantive law that require payment of interest for breach of contract. The work has been performed, GRS is lawfully entitled to payment, and has been deprived of its money from the respective dates set out above.

The argument on which GRS relies was not advanced in *Granite Construction Co.*, Eng. BCA 3561, 76-1 BCA ¶ 11,748, and the Board is therefore requested to reconsider the soundness of that decision.

The principles which require the denial of interest on claims against the United States, whether presented as a breach of contract case or as a constructive change claim, were well described by the court in *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431-433, 101 F. Supp. 353, 356 (1951), cert. denied 343 U.S. 977 (1952) as follows:

> "The law is well settled that, at the general rule, special damages, beyond the amount recognized at legal interest, cannot be recovered for a breach of contract to pay money which results only in a delay in payment. [citations omitted]
>
> "The law implies an agreement to make good the loss arising from a default in payment of money at a specified time by requiring the payment of lawful interest. [citations omitted] Therefore, the only measure of damages which plaintiffs could recover for the delay would be legal interest on the principal amount withheld.
>
> "However, the common law rule that the delay or default in payment of money gives rise to a right to recover interest has been held not to be applicable to the sovereign government on grounds of public convenience, unless the sovereign's consent to pay interest has been exhibited by an act of the Congress, or by lawful contract of its executive officers. [citations omitted]
>
> "A provision in a Government contract for the payment of interest must be affirmative, clear-cut, and unambiguous. [citation omitted] The Supreme Court has held that although an award of interest

on a claim against the United States would be just or equitable, this fact alone does not empower the Court of Claims to make such an award on the basis of what they think is a sound policy. The immunity of the United States for liability of interest on unpaid claims is not to be waived by such policy arguments. [citation omitted]"

The Boards of Contract Appeals have found that the term "equitable adjustment" *expands* the class of cases in which interest may be claimed against the sovereign United States beyond what would be permitted in a case for breach of contract prosecuted in court, where no such provision was in the contract. *Bell* v. *United States*, 186 Ct. Cl. 189, 404 F.2d 975 (1968). That term plainly is not restrictive either by its dictionary meaning or by its interpretation in claims against the sovereign.

WMATA's argument based on "trade practice" is fallacious. The term "equitable adjustment" does not, by itself, lead to a denial of interest in claims against the United States. Sovereign immunity unique to the United States produces that result, while the term "equitable adjustment" moderates the harsh implications. The contractor familiar with the unique history of interest claims against the United States would understand that sovereign immunity required that result. See, e.g., Boyd, "Interest on Contract Claims," 2 Briefing Papers Collection, p. 74-75. Although a contractor would make the appropriate allowance in its bid for work with the United States, it would have no similar reason to make allowance in its bid for work with WMATA, which has no similar immunity.

Finally, WMATA's argument relies on having the special meaning it assigns to the term "equitable adjustment" accepted over the reasonable interpretation advanced by the contractor. To accept WMATA's interpretation is to ignore the recognized rule that ambigui-

ties are to be construed against the author of the contract documents. If WMATA wished to impose on the contractor such a severe penalty as the waiver of the substantive right to interest on sums of money wrongfully withheld, WMATA should have so provided in the contract documents. A waiver of this substantive right should not be implied from the ambiguous and doubtful construction that WMATA advances from the term "equitable adjustment."

* * * *

May 12, 1976

APPENDIX R

BEFORE THE CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

Eng BCA 3560, 3592, 3638

IN THE APPEALS OF
GENERAL RAILWAY SIGNAL CO.
UNDER WMATA CONTRACT NO. 1Z4206

RESPONDENT'S REPLY BRIEF

* * * *

V. Appellant is not entitled to interest at the legal rate recognized in the District of Columbia.

As stated at page 34 of its post-hearing brief, Appellant seeks legal interest on the stipulated equitable adjustments to be made in the event the Board finds entitlement on the subject claims. This interest request would represent compensation for delay in payment and hence be a form of damages which is restricted to breach of contract actions. In *Bell* v. *United States*,[1] relied on by Appellant at page 35 of its brief, the Court of Claims distinguished between actions for breach of contract and disputes under the remedy clauses of the contract. As in *Bell*, Appellant here has agreed to a contract containing a "change" clause where an equitable adjustment was the prescribed remedy for Authority directed changes to contract work. The term "equitable adjustment" as used in government contracts has developed a trade usage which contractors are either aware of or are charged with knowledge thereof. *General Builders Supply Co., Inc.* v. *The United States*, 187 Ct. Cl. 477, 482 (1969). The term has consistently been used to limit recovery to

[1] 186 Ct. Cl. 189, 206 (1968).

the increased cost of construction as a result of the change. Consequently, if a contractor incurs increased interest costs on money borrowed to perform the changed work, this would be a legitimate cost under the "changes" clause of a WMATA contract. Interest resulting solely from a delay in payment, however, is not a tangible cost of construction and has not been so treated.

As Appellant is limited to its contractual remedy under Article 1.3 of the General Provisions, its recovery is restricted to the prescribed equitable adjustment. There being no additional remedy granting clauses which would recognize interest of the type sought here, Appellant's claim for interest costs should be denied. See *J.R. Erickson*, AGBCA No. 333, 76-1 BCA 11,716.

* * * *

May 18, 1976

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-657

GENERAL RAILWAY SIGNAL COMPANY
801 West Avenue
Rochester, New York 14611
(716) 436-2020,

Plaintiff,

—vs—

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
600 Fifth Street, N.W.
Washington, D.C. 20001,

Defendant.

COMPLAINT

Plaintiff GENERAL RAILWAY SIGNAL COMPANY ("GRS") for its Complaint against defendant Washington Metropolitan Area Transit Authority ("WMATA"), alleges as follows:

1. The jurisdiction of this Court is founded on diversity of citizenship and an amount in controversy in excess of $10,000.00.

2. Plaintiff GRS is a Delaware corporation having its principal offices and place of business in Rochester, New York

3. Defendant WMATA is a body corporate and politic, having its office and principal place of business in the District of Columbia, and created by interestate compact adopted by the State of Maryland (Ch. 849, Law

1965), the State of Virginia (Ch. 2, Laws 1966) and the District of Columbia (P.L. 84-774, [*sic*] 80 Stat. 1324) with the consent of the Congress of the United States (P.L. 84-774, [*sic*] 80 Stat. 1324).

4. The contracts referred to below were executed by WMATA in the District of Columbia and were to be performed, in substantial part, in the District of Columbia.

5. WMATA enjoys no sovereign or statutory immunity from the payment of interest on claims or actions against it based on breach of contract.

6. On June 3, 1971 WMATA designated the Corps of Engineers Board of Contract Appeals ("Board of Contract Appeals") as its authorized representative to hear, consider and recommend final decisions on appeals arising under the Disputes clause of WMATA contracts, including the contracts with GRS mentioned below.

COUNT I

7. On February 23, 1971, following competitive bidding based on its Invitation For Bids No. IFB-0-1- issued on October 12, 1970, WMATA awarded Contract No. 1Z4206 to GRS for alterations in the interlocking signaling and train control equipment at the railroad yard of the Washington Terminal Company located in the District of Columbia.

8. The contract documents pertinent to the present controversy are the Invitation for Bids (Exhibit A hereto), the Bid Form (Exhibit B hereto) and the General Provisions (Exhibit C hereto).

9. On or about December 9, 1971 WMATA directed GRS to furnish call-on circuits for a number of signals in an area of work identified as Wye Bridge Interlocking.

10. GRS notified WMATA that this directive called for work not covered by the terms of the contract and constituted extras and changes for which GRS was entitled to compensation.

11. On or about July 14, 1972 GRS submitted to WMATA its written claim for the additional costs of supplying the circuitry and related equipment to comply with the above directive.

12. On or before December 13, 1973 GRS had performed the above extra work and had demanded payment for its additional costs.

13. Solely as a result of delays by WMATA, it was not until August 2, 1974 when WMATA's Contracting Officer issued his final decisions denying the claim by GRS.

14. Following the denial of its claim by the Contracting Officer, GRS presented its appeal to the Board of Contract Appeals. During the appeal, GRS and WMATA stipulated that GRS incurred $22,285.00 in additional costs in performing the disputed work (an amount not including any factor for interest), and GRS presented a further claim for interest on the capital expended by GRS in performing the disputed work, such interest to run from December, 1973.

15. On August 30, 1976 the Board of Contract Appeals issued its decision (Exhibit I hereto) upholding GRS' claim for $22,285.00, but wrongfully denying GRS' claim for interest. Thereafter, WMATA's Board of Governors [*sic*] adopted the decision of the Board of Contract Appeals.

16. It was not until January, 1973 when GRS received payment for the costs of the work performed before December 18, 1973. GRS has been deprived of its money and capital for more than three years, and has received no compensation for such deprivation. Under these cir-

cumstances, the recovery of interest is necessary to effect an equitable adjustment of the contract price and to fully and fairly compensate GRS for the forced use of the capital in financing the cost of changes mandated by WMATA.

17. By reason of the above, GRS requests the recovery of interests on the sum of $22,285.00 from December 13, 1973 to January, 1977 based on the legal rate applicable under the laws of the District of Columbia, or based on the rate of interest incurred by plaintiff on the general borrowings, or based on the rate of return that plaintiff would have earned on such sum in conservative investments.

COUNT II

18. GRS realleges paragraphs 7 and 8 above.

19. On or about December 9, 1971 WMATA directed GRS to provide double-break circuitry in all control circuits within the railroad yard, rather than within the areas where modifications were required under the contract.

20. GRS notified WMATA what this direction called for work not covered by the terms of the contract and constituted extras and changes for which GRS was entitled to compensation.

21. On or about August 14, 1972 GRS submitted to WMATA its written claim for the additional costs of complying with the above direction.

22. On or before August 20, 1973 GRS had performed the above extra work and had demanded payment for its additional costs.

23. Solely as a result of delays by WMATA, it was not until March 24, 1975 when WMATA's Contracting Officer issued his final decision denying the claim by GRS.

24. Following the denial of its claim by WMATA's Contracting Officer, GRS presented its appeal to the Board of Contract Appeals. During the appeal, GRS and WMATA stipulated that GRS incurred costs of $135,-444.00 in performing the disputed work (an amount not including any allowance for interest), and GRS presented a further claim for interest on the capital expended by GRS in performing the disputed work.

25. On August 30, 1976 the Board of Contract Appeals issued its decision (Exhibit D hereto) upholding GRS's claim for $135,444.00, but wrongfully denying GRS's claim for interest. Thereafter, WMATA's Board of Governors [*sic*] adopted the decision of the Board of Contract Appeals.

26. It was not until January, 1977 when GRS received payment for the costs of the work performed before August 20, 1973. GRS has been deprived of its money and capital for approximately three and one-half years, and has received no compensation for such deprivation.

27. Under these circumstances, the recovery of interest, based on the legal rate applicable in the District of Columbia, the rate of interest incurred by plaintiff on its general borrowings, or the rate of return on conservative investment, is necessary to effect an equitable adjustment of the contract price and to fully and totally compensate GRS for the forced use of its capital in financing the cost of changes mandated by WMATA.

WHEREFORE, GRS requests judgment against WMATA as follows:

1. On Count I, judgment at the applicable interest rate, as determined by this Court, on the amount of $22,285 for the period from December 13, 1973 to January, 1977;

2. On Count II, judgment at the applicable interest rate, as determined by this Court, on the amount of $135,444.00 from August 20, 1973 to January 11, 1977;

3. Costs and Disbursements of this action.

Dated: April 14, 1977

/s/ Stephen Kurzman
STEPHEN KURZMAN
NIXON, HARGRAVE, DEVANS & DOYLE
1666 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 872-0044

Of Counsel,
William D. Eggers
Paula M. Connelly
Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, New York 14603
(716) 546-8000

[Exhibits omitted in printing]

APPENDIX T

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

* * * *

VII. *RESERVATION OF RIGHTS*

The instant case was brought to this Court for judicial review of the administrative decisions of the WMATA Board of Directors. At no time did plaintiff allege administratively that it was entitled to interest resulting from a breach of WMATA's implied duty to render a timely decision. This Court, on its own motion, injected an issue of breach of contract and remanded the matter to the WMATA Board of Directors for further administrative determination as to the facts. This is considered to be beyond the jurisdiction of a court in a Wunderlich type review situation with which the Court is here concerned. Defendant's request for certification of this Court's interlocutory decision and immediate appeal pursuant to 28 U.S.C. § 1292(b) was denied by the Court.

An action for breach of contract is beyond the purview of Article 1.6 of the contract General Provisions and the jurisdiction of a board of contract appeals. Breach of contract actions must be separately brought and so pleaded in a court of competent jurisdiction. This plaintiff has not done so in the instant action.

Defendant participated in the rehearing before the administration tribunal and argued the issue of breach of contract solely pursuant to the mandate of this court. In so doing defendant reserves all of its rights to renew its various arguments and contentions on appeal.

* * * *

June 14, 1979

APPENDIX U

NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys and Counselors at Law
Lincoln First Tower
Rochester, N.Y. 14603

(716) 546-8000

January 5, 1976

Lewis J. Baker, Esq.
Trial Attorney
Washington Metropolitan Area Transit Authority
600 Fifth Street, N.W.
Washington, D.C. 20001

RE: Appeals of General Railway Signal Company
Eng BCA 3560, 3592 & 3638

Dear Larry:

This will confirm our conversations in November and December in which I advised you that we would be raising the issue of interest on the amounts stated in our complaints on the above matter.

We will not attempt to show that there was borrowing by General Railway Signal in the specific amounts of the changes involved in the claims, related by time to the work performed. Our claim is that General Railway Signal had general borrowing on which it incurred expenses and that these expenses would have been reduced if the company had received its proper equitable adjustment. From another point of view, General Railway Signal has lost the use of its money during the period in question.

The amounts claimed in interest are as follows:

Eng. BCA	3560	$ 5,994.00
Eng. BCA	3592	$ 9,792.00
Eng. BCA	3638	$36,097.00

At the start of the hearing on January 12 we will request that our complaints be deemed so amended.

Very truly yours,

/s/ William D. Eggers
WILLIAM D. EGGERS

WDE/mw

CC: Mrs. Frances H. Aceto
Recorder, Corps of Engineers BCA
Department of the Army
Washington, D.C. 20314

ATTENTION: DAEN-GCB

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1498

JOHN J. WILSON, INC.,
Plaintiff and
Counter Defendant,

vs.

GRANITE-GROVES, A Joint Venture, *et al.*,
Defendant, Counter
Claimant, and Third-
Party Plaintiff,

vs.

UNITED SHEET METAL, INC.,

and

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Third-Party Defendants.

Filed Dec. 22, 1978

MEMORANDUM OPINION

John J. Wilson, Inc. (Wilson) brought this action against Granite-Groves, a joint venture, the component companies of the joint venture, Granite Construction Company, (Granite) and S. J. Groves & Sons Company (Groves), as well as Pacific Indemnity Company, Federal Insurance Company and Commercial Union Insur-

ance Company as sureties of Granite and Groves under a standard form Washington Metropolitan Area Authority (WMATA) Payment bond executed on September 21, 1973. In the first count of its complaint, Wilson alleges that Granite-Groves has breached its subcontract of November 7, 1973 for the construction of mechanical work, track drainage systems and an interim pumping system at the Stadium-Armory Metro station by refusing to pay Wilson the past due and owing amount of $25,954.86. In the second count of its complaint, Wilson alleges that Granite-Groves is liable to Wilson in the amount of $20,115.04 for the extra-cost of replacing ductwork which Wilson had completed at the Stadium-Armory Metro station.

In its answer, Granite-Groves raised counterclaims against Wilson in the amount of $21,483.00 [1] and third-party complaints against United Sheet Metal and WMATA. Granite-Groves alleges that if the WMATA ductwork specifications were in error and were the proximate cause of the duct failure, then Granite-Groves is entitled to be indemnified by WMATA.[2] Granite-Groves alleges in the alternative that if the WMATA specifica-

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[1] This amount includes $1,600.00 for the use of a crane; $260.00 for the value of a welding machine and welding materials; $3,044.00 for work which Granite-Groves performed during a plumber's strike; $1,000.00 for clean-up work which Wilson allegedly was obligated to perform; $8,733.00 for costs incurred to repair collapsed ductwork; and $6,956.00 for costs incurred to repair a leaking duct installed by Wilson. Granite-Groves states that the first four amounts listed above were the subject of an accounting under which Wilson and Granite-Groves allegedly agreed that such amounts would be set-off against the sum of $4,042.47 for service work performed by plaintiff for Granite-Groves' account.

[2] Granite-Groves also alleges that if the ductwork collapsed as a result of defective specifications, it is additionally entitled to be indemnified in the amount of $10,553.77 for the costs of repair work undertaken by Granite-Groves.

tions were not in error, Granite-Groves is entitled to be indemnified by Wilson and United Sheet Metal [3] for defective installation of the ductwork.

The matter before us concerns WMATA's motion to dismiss the third-party complaint against it, alleging *inter alia*, that Granite-Groves has failed to exhaust its administrative remedies. Granite-Groves has opposed this motion but has also filed a motion to stay this action pending an administrative decision on Granite-Groves' claims if WMATA's motion to dismiss is granted. Plaintiff Wilson has filed an opposition to Granite-Groves' motion to stay.

For reasons discussed below, we first hold that we lack jurisdiction over (1) the claim of Wilson against Granite-Groves and (2) the claims of Granite-Groves against Wilson and United Sheet Metal, all such claims being for costs incurred as a result of the collapsed ductwork. Second, we hold that we have jurisdiction over Wilson's claim for breach of contract (Complaint, Count I) and over those of Granite-Groves' counterclaims against Wilson which do not pertain to costs incurred as a result of the collapsed ductwork. Third, we deny Granite-Groves' motion for stay of the instant proceedings pending the outcome of administrative proceedings involving the claims arising out of the collapsed ductwork.

I. PROCEDURAL BACKGROUND

On November 7, 1975, Granite-Groves signed a subcontract with Wilson for the construction of mechanical work, track drainage systems and an interim pumping system which Granite-Groves was required to perform under its prime contract with WMATA. This work was to be performed at the Stadium-Armory Metro station.

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[3] United Sheet Metal performed much of the contracted work at issue in this action pursuant to a subcontract with Wilson.

On October 8, 1975, a mechanical duct installed by United Sheet Metal, a subcontractor of Wilson, collapsed while encasing concrete was being poured around the duct under the direction of Wilson. The duct collapsed on two other occasions and on each occasion Wilson repaired the concrete encased duct.

Also, during the course of construction, a duct installed by United and Wilson began to leak water. On July 23, 1976, WMATA made a written demand upon Granite-Groves to take immediate action to stop this leak. Granite-Groves, in turn, demanded that Wilson and United Sheet Metal undertake and complete the necessary repair work. The work was then completed by Wilson and United Sheet Metal.

Granite-Groves, in a letter dated August 2, 1976, presented a claim for $37,124.10 to the Resident Engineer of WMATA for additional costs incurred from the collapsed ductwork. This letter also requested a final decision by a WMATA Contracting Officer on this claim. By letter dated November 11, 1977, Granite-Groves demanded that the WMATA Contracting Officer issue a final decision on its claim and it further stated that failure to issue a decision would be considered a breach of contract. *See* exhibit 6, attached to defendant's opposition to plaintiff's motion to dismiss. Although WMATA alleges that it never received this letter,[4] the Contracting Officer issued a final decision on this claim on October 16, 1978. The Contracting Officer denied the claim on the ground that the contractor disregarded the contract requirements. Granite-Groves has filed a notice of appeal of this decision with the United States Army Corps of Engineers Board of Contract Appeals. (Board of Contract Appeals).

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[4] Affidavit of Joseph F. Garbacz, attached as enclosure 3 to WMATA's motion to dismiss.

On June 15, 1977, Granite-Groves submitted a claim for the costs of repairing the water leak and requested a final decision of the WMATA Contracting Officer on this claim. In a decision issued on October 19, 1978, the Contracting Officer denied the claim on the ground that the work was not performed in a workmanlike manner in accordance with sound engineering practice. Granite-Groves has also filed a notice of appeal of this decision with the Board of Contract Appeals. WMATA in its motion to dismiss anticipates that the Board of Contract Appeals will require approximately 18 months to reach decisions on Granite-Groves' two appeals.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES FOR DUCTWORK CLAIMS

A. Exhaustion by Granite-Groves

The prime contract between WMATA and Granite-Groves establishes a two-tiered administrative review procedure for contract disputes. See Article 1.6, the Disputes Article, cited in WMATA's motion to dismiss, n. 1. Factual disputes not resolved between the parties are initially decided by the WMATA Contracting Officer. This decision becomes "final and conclusive" if it is not appealed, in writing, within thirty days after it is received by the claimant. *Id.* If appealed, the Contracting Officer's decision is reviewed by the WMATA Board of Directors or "its duly authorized representative for determination of such appeals." *Id.* The WMATA Board of Directors has authorized the Board of Contract Appeals to act as its representative for appeals arising under the disputes clause of WMATA contracts. The decision of the Board of Contract Appeals is final as to all questions of fact arising under the contract unless the decision is determined by a court of competent jurisdiction to be "fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." *Id.*

WMATA contends that Granite-Groves has not exhausted its administrative remedies because it has yet to present its claims to the Board of Contract Appeals [5] and that this Court lacks jurisdiction to consider these claims because of Granite-Groves' failure to exhaust. Granite-Groves contends that exhaustion is not required where there is a breach of an implied obligation to resolve claims through an administrative process in a reasonable time.

It is well settled that exhaustion of contractually specified administrative remedies is a prerequisite to the exercise of jurisdiction by a Court. *See, e.g., United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *Zidell Explorations, Inc.* v. *United States*, 427 F.2d 735 (Ct.Cl. 1970); *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096, 1101 (D.C. Cir. 1969). It is, however, equally well settled that exhaustion is not required where an administrative remedy would be inadequate or futile. *See, e.g., United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-32 (1966); *United States* v. *Holpuch Co.*, 328 U.S. 234, 240 (1945). The issue thus raised by WMATA's motion to dismiss is whether exhaustion is required despite delays of 21 and 16 months for the Contracting Officer's decisions on the two Granite-Groves claims and the anticipated 18-month delay in the issuance of decisions on these claims by the Board of Contract Appeals.

We hold that Granite-Groves is not relieved of its contractual responsibility to pursue its administrative remedy by the delays attendant to the processing of its ductwork claims. This remedy should be exhausted before Granite-Groves can raise such claims against WMATA or against Wilson or United Sheet Metal. In determining

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[5] We note that WMATA has made no showing that it has been prejudiced by the filing of Granite-Groves' opposition to WMATA's motion to dismiss 10 days after it was originally to have been filed.

whether an administrative remedy is inadequate, this Court must consider all of the circumstances giving rise to such delay. *See Sun Shipbuilding & Dry Dock Co.* v. *United States*, 461 F.2d 1352, 1358-59 (Ct. Cl. 1972); *cert. denied*, 409 U.S. 1023 (1972). The mere passage of time, if otherwise excused, is an insufficient basis upon which to find that an administrative remedy is inadequate. *Id. See also Norair Engineering Corp.* v. *Washington Metropolitan Area Transit Authority* Civil Action No. 78-1010, Mem. Op., Oct. 30, 1978, D.D.C. (eleven month delay in issuance of final decision by WMATA Contracting Officer would not render administrative process futile).

We find nothing in the record of this case which suggests that the Contracting Officer has been unwilling to act or comply with the administrative procedures set forth in the WMATA-Granite-Groves contract.[6] First, the Contracting Officer appropriately devoted considerable time to evaluate the complex factual issues underlying Granite-Groves' ductwork claims.[7] Second, the time required to reach these technical decisions was not unreasonable when it is recognized that these decisions were but two of thirteen final decisions, involving an aggregate

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[6] Contrary to the assertion of plaintiff, the instant action is inapposite to the situation confronting the Court of Claims in *Manpower, Inc. of Tidewater* v. *United States*, 513 F.2d 1396 (Ct.Cl. 1975), where the Navy did not even consider a relatively small and uncomplicated claim for over two and one-half years. The instant claims required the Contracting Officer to make complex technical findings regarding the cause of collapsed and leaking ductwork.

[7] Regardless of whether WMATA actually received the November 11, 1977 letter from Granite-Groves requesting a prompt final decision, we find that there was no breach of contract by WMATA because of the long delay in the issuance of final decisions by the Contracting Officer. The Contracting Officer processed the ductwork claims in an equitable manner relative to other Granite-Groves' claims and the claims of other contractors.

amount of approximately $600,000.00 that have been issued by the Contracting Officer in disputes between WMATA and Granite-Groves. Third, Granite-Groves has not demonstrated that it has sustained undue hardship because of delays in the processing of its claims. Finally, exhaustion of administrative remedies will ensure that the ductwork claims will be resolved by individuals possessing the technical expertise needed to decide the complex claims arising in a large scale construction project.[8]

B. Exhaustion by Wilson.

Granite-Groves has filed a motion for a stay of proceedings in this action pending an administrative decision by WMATA if this Court grants WMATA's motion to dismiss. Granite-Groves first contends that provisions in the Wilson-Granite-Groves subcontract require Wilson to exhaust its administrative remedies against WMATA before it can initiate legal action against Granite-Groves.

We need not belabor the contentions of the parties. Although Granite-Groves has raised the exhaustion argument in the context of its motion to stay, we find that it is applicable to our jurisdiction to consider Wilson's claims for the collapsed ductwork. We hold that Wilson is required to exhaust the administrative remedies for its ductwork claims (Complaint, Count II) before we may exercise jurisdiction over such claims.

The terms of the subcontract between Wilson and Granite-Groves do not expressly require that Wilson pursue its administrative remedies under the disputes clause of the prime contract between WMATA and Granite-

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[8] Because of our ruling that this Court lacks jurisdiction to consider Granite-Groves' ductwork claims, we need not decide WMATA's subsidiary arguments that (1) WMATA has not breached its contract with Granite-Groves; and (2) WMATA has no privity of contract with Wilson; and (3) the terms of the payment bond preclude an action against WMATA.

Groves. The preamble of the subcontract states that the "terms and conditions" of the prime contract are "made a part of this subcontract." [9] This language, when coupled with Article XXXI of the subcontract,[10] imposes a joint obligation upon Wilson and Granite-Groves to pursue and exhaust administrative remedies for expenses arising out of conditions beyond the control of either party. Article XXXI states that compensation claims made by Wilson to Granite-Groves will in turn be presented by Granite-Groves to WMATA. This Article therefore implicitly relies upon the procedures for resolving disputes under the Granite-Groves-WMATA contract. The ductwork claims, based on the allegations that WMATA supplied defective specifications, clearly fall within the terms of Article XXXI as arising out of conditions beyond the control of Wilson or Granite-Groves. Wilson has prepared these claims and has forwarded them to Granite-Groves. Granite-Groves has formally submitted these claims to the Contracting Officer. Although Granite-Groves has appealed the decisions of the Con-

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[9] The preamble to the subcontract between Granite-Groves and Wilson, exhibit 1, Granite-Groves' motion to stay, states in pertinent part:

> WHEREAS, Subcontractor acknowledges that it is familiar with the terms and conditions of the General Contract and that the General Contract is a part hereof and the terms and provisions thereof are incorporated herein and made a part of this Subcontract; . . .

[10] Article XXXI, subcontract between Granite-Groves and Wilson, *id.* sets forth the conditions under which Wilson may file a claim:

> Regardless of any provision if this Contract the Subcontractor expressly has the right to assert claims for additional compensation in the event any condition beyond the control of either party hereto shall arise. Contractor will process such claims to the owner. Adjustments in compensation shall be made only to the proportionate extent as the Contractor's compensation under the General Contract is adjusted by the Owner on account of such event.

tracting Officer, Wilson in fact will prosecute its own claims before the Board of Contract Appeals. Since we have held that Granite-Groves must exhaust its administrative remedies, it necessarily follows that Wilson should also be required to exhaust the administrative remedies which it has elected to pursue and which it will in fact pursue in the name of Granite-Groves. This Court therefore lacks jurisdiction to consider Wilson's ductwork claims.

Our jurisdictional holding is reinforced by considerations of equity and judicial economy. Granite-Groves correctly contends that it may be prejudiced by findings made by the Board of Contract Appeals. WMATA will no longer be a party to this action. If Granite-Groves should therefore prevail on the ductwork claims in this Court, it presumably could not use our decision to collaterally estop WMATA. Granite-Groves would therefore be required to relitigate the same factual issues before the Board of Contract Appeals. Such relitigation would not only be a misuse of adjudicative resources but would also subject Granite-Groves to the risk of inconsistent results in two proceedings. Because Wilson is conducting the administrative presentation of Granite-Groves' ductwork claims before the Board of Contract Appeals, Wilson can make no persuasive claim that it will be prejudiced by our decision that this Court lacks jurisdiction over the ductwork claims of Wilson and Granite-Groves.

III. CLAIMS FOR COMPLETED WORK

Unlike the ductwork claims, Wilson's claims for amounts past due for completed work do not necessarily fall within the terms of Article XXXI of the subcontract as "claims for additional compensation" arising from a "condition beyond the control of either party." However, to the extent that some of these claims may seek compensation for work which is the subject matter

of the ductwork claims, this Court lacks jurisdiction to consider these claims.

An order consistent with this opinion has been entered this day.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

December 22nd, 1978.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1498

JOHN J. WILSON, INC.,
Plaintiff and Counter Defendant,

vs.

GRANITE-GROVES, A Joint Venture, *et al.*,
Defendant, Counter Claimant, and
Third-Party Plaintiff,

vs.

UNITED SHEET METAL, INC.,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Third-Party Defendants.

Filed Dec. 22, 1978

ORDER

Upon consideration of the motion of Washington Metropolitan Transit Authority to dismiss the third-party complaint of Granite-Groves and the motion to stay judicial proceedings filed by Granite-Groves, and the respective oppositions and replies thereto, and the entire record in this action, it is this 22nd day of December, 1978.

ORDERED that the motion of the Washington Metropolitan Area Transit Authority to dismiss the third-party complaint filed by Granite-Groves be granted and the

third-party complaint filed by Granite-Groves against the Washington Metropolitan Area Transit Authority be, and hereby is, dismissed without prejudice for lack of subject matter jurisdiction;

ORDERED that the third-party complaint filed by Granite-Groves against United Sheet Metal, Inc., and the counterclaims filed by Granite-Groves against John J. Wilson, Inc. be, and hereby are, dismissed without prejuduce for lack of subject matter jurisdiction to the extent that the complaint and counterclaims involve ductwork claims which are currently pending before the United States Army Corps of Engineers pending administrative procedure;

ORDERED that Count I of the complaint of John J. Wilson, Inc. be and hereby is, dismissed without prejudice for lack of subject matter jurisdiction insofar as Count I involves ductwork claims which are currently pending before the United States Army Corps of Engineers Board of Contract Appeals, or are otherwise the subject of a pending administrative proceedure; and it is further

ORDERED that the motion to stay of Granite-Groves be and the same is hereby denied.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX W

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0657

GENERAL RAILWAY SIGNAL COMPANY,
Plaintiff,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

PLAINTIFF'S REPLY MEMORANDUM

* * * *

III.

WMATA's claim that this action is one pursuant to the contract rather than one for breach of contract is pure sophistry. WMATA confuses the administrative remedy provided by the contract with the substantive contract rights of the parties in the event that extra work is demanded. It is true that the contractual claim for extra work is initially litigated before the Board under the disputes clause. It is equally true, however, that the nature of this claim is such that the average person would consider it to be a claim for a breach of contract litigated in an administrative form. WMATA's attempt to play with the various descriptions of claims used for wholly different purposes should in no way take this claim outside of the classification of a contract claim within the meaning of D.C. Code § 15-109.

Although WMATA has apparently abandoned its false contention that the applicability of D.C. Code § 15-109 was not litigated before the Board, it now suggests that

GRS "accepted the relief granted [by the Board]" and is change[ing] horses in mid stream." We believe that the record is clear that GRS has presented and preserved the issue of interest at all appropriate stages.

Because the issue of unreasonable delay is a subsidiary issue within the general question of whether D.C. Code § 15-109 requires the award of interest, that question as well was before the Board. At the time of the proceedings before the Board, and at the time of the proceedings before this Court, plaintiff did not assert that unreasonable delay by the Contracting Officer was the only justification for awarding interest in this case, or that such a finding was a necessary pre-condition to such an award. However, at both stages, it was a relevant factor to the determination of whether plaintiff should be awarded interest to fully compensate it for the forced use of its capital to finance charges mandated by WMATA.

DATED: September 2, 1977.

* * * *

APPENDIX X

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
980 South L'Enfant Plaza, S.W.
Washington, D. C. 20024

RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

WHEREAS, the Board of Directors has provided in the Procurement Policies for the Washington Metropolitan Area Transit Authority that:

> "It is the policy of the WMATA, in the interest of timely and economical resolution of contractual disputes, to provide in certain of its contracts as hereinafter set forth, for an administrative appeal from adverse decisions of Contracting Officers."; and

WHEREAS, it is considered to be in the best interests of the Authority to delegate to an established Board of Contract Appeals the responsibility to hear and render advisory opinions on appeals taken from decisions of Contracting Officers; and

WHEREAS, the Chief of Engineers, Department of the Army, has informed the Authority that an arrangement under which the Corps of Engineers Board of Contract Appeals would hear and render opinions on said appeals would be acceptable to the Corps of Engineers;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Washington Metropolitan Area

Transit Authority that the Corps of Engineers Board of Contract Appeals is hereby designated as the authorized representative of this Board to hear, consider and recommend to the General Manager of the Authority final decisions on appeals arising under the Disputes clause of Authority contracts and the General Manager is authorized and directed to reimburse the Corps of Engineers for all costs incurred in rendering such services.

RESOLUTION OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

SUBJECT: WMATA Procurement Policies and Procedures

ADOPTED: July 7, 1967

REVISED: March 21, 1968; October 2, 1969

WHEREAS, the Board of Directors of the Washington Metropolitan Area Transit Authority has determined that it is desirable and necessary to establish procurement policies and procedures for the efficient operation of the Authority; and

WHEREAS, under the provisions of the Washington Metropolitan Area Transit Authority Compact such authority is vested in the said Board of Directors to establish such policies and procedures:

NOW THEREFORE, BE IT RESOLVED, by the Board of Directors of the Washington Metropolitan Area Transit Authority that the following procurement policies, procedures, rules and regulations for the efficient operation of the Authority be and they are hereby adopted.

BE IT FURTHER RESOLVED, that The Board of Directors hereby expressly. reserves the right to alter,

amend or waive these regulations in whole or in part in its discretion.

* * * *

CHAPTER V

CONTRACT CLAIMS AND DISPUTES

A. *Policy.* It is the policy of the WMATA, in the interest of time and economical resolution of contractual disputes, to provide in certain of its contracts as hereinafter set forth, for an administrative appeal from adverse decisions of Contracting Officers.

B. *Disputes Clause.* Except as otherwise determined by the General Manager, all contracts entered into on behalf of the Authority in an amount in excees of $10,000 shall contain the following "Disputes" clause:

"Disputes"

1. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors. The decision of the Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply

bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this Article, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with performance of the contract and in accordance with the Contracting Officer's decision.

2. This Disputes article does not preclude consideration of questions of law in connection with decisions provided for in Paragraph 1 above. Nothing in this contract, however, shall be construed as making final the decisions of the Board of Directors or its representative on a question of law.

C. *Appointment.* The General Manager is hereby designated and appointed as the duly authorized representative of the Board of Directors of the WMATA to hear, consider and decide as fully and finally as the Board of Directors might do, appeals to the Board of Directors under contracts which contain the "Disputes" clause hereinabove set forth.